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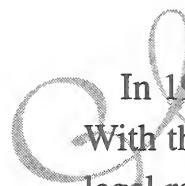
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FROM STUDENTS TO LAWYERS: JOINT VENTURES IN LEGAL LEARNING FOR THE ACADEMY, BENCH, AND BAR

RANDALL T. SHEPARD*

INTRODUCTION

The present decade has featured a renewed dialogue among the three principal elements of the legal profession: practicing lawyers, judges, and law teachers. This dialogue has proceeded in a more purposeful way than has sometimes been the case in the past,¹ though it is still all too easy for these discussions to meander from elevated, polite exchanges that lead nowhere to acrimonious ones that lead to frigid relationships. I believe that the time committed to the present efforts will reward the profession in the long run.

Sometimes, both polite declarations and caustic ones seem necessary precursors to more fruitful debate.² The recent Indiana Conclave on Legal Education began on notes that were so cerebral and positive and gentle that I doubted anything really neat was going to happen. The ice finally broke in late afternoon, however, when one of our friends from the academy explained to the lawyer next to her why practitioners were not more often used as instructors by saying, “You know, we’re really committed at our law school to quality and some of these adjuncts that we managed to recruit come in unprepared, or sometimes they don’t come at all.” He replied tartly, “Well, you’re the guys who are hiring all these professors with esoteric educations and no experience practicing. Just what does quality mean to you, anyway?”³ This exchange reminded me of a line

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1. The debate concerning how law schools, practitioners, and courts should interact is not a new one. *See Learned Hand, Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466 (1926).

2. The line between vigorous dialogue and simple name-calling is often a matter of maintaining mutual respect among the parties. In a recent speech at the University of Virginia School of Law addressing the possibility of a mutually beneficial partnership between law schools and the bench, Associate Justice Ruth Bader Ginsburg noted that discussion is most productive if the participants “are honest and careful, and do not, as Learned Hand said of the lazy judge, attempt to ‘win the game by sweeping [opposing chess pieces] off the table.’” Associate Justice Ruth Bader Ginsberg, *On the Interdependence of Law Schools and Law Courts*, 83 VA. L. REV. 829, 832 (quoting New York Chief Judge Judith Kaye (quoting Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 362 (1939))).

3. Judge Harry T. Edwards has explored the sometimes disparate views held by the academy and the bar in regard to the purpose of legal education. He has also considered how the current schism may affect the legal profession in the future. Edwards summarizes his position in the following manner:

[M]any law schools—especially the so-called “elite” ones—have abandoned their

from the musical *1776*. In the course of debating what ought to be said and what might be left unsaid in the Declaration of Independence, John Adams turns to one of his fellows and says, "This is a revolution, dammit! We're going to have to offend *somebody!*"⁴

The foregoing exchange did for Indiana's conclave what the practitioners and the academicians on the American Bar Association's "MacCrate Task Force" accomplished on a larger scale.⁵ It highlighted some of the touchy debates that persist between the practitioner and the academy, as well as inside the academy itself. For example, the MacCrate Report and the ensuing discussions have rendered a little more visible the tensions between traditional, tenured faculty and non-traditional, non-tenured clinical faculty; these faculty groups do not necessarily have a unity of interest concerning the shape of modern American legal education. It has also made more evident an interesting fissure inside the academy between the "top" schools (and if *U.S. News* does not really know who they are,⁶ they know who they are⁷) and the rest of humanity, which is to say most of us.

proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. Many law firms have also abandoned their place, by pursuing profit above all else. While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both.

This disjunction calls into question our status as an honorable profession.

Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993); Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561 (1994).

4. SHERMAN EDWARDS, *1776: A MUSICAL PLAY* sc. 7 (The Viking Press 1970).

5. Formally known as The Task Force on Law Schools and the Profession: Narrowing the Gap, the group functioned as part of the Association's Section of Legal Education and Admissions to the Bar. See AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter MacCrate Report]. The authors of the MacCrate Report included several knowledgeable representatives from the academy. Professor Peter W. Martin and Associate Dean Peter A. Winograd acted as the Task Force's two vice chairpersons. Professor J. Michael Norwood served as Reporter. Membership on the Task Force included nearly equal distributions of representatives from the bar, bench, and academy. *Id.* at v.

6. See Terry Carter, *Rankled by the Rankings*, A.B.A. J., Mar. 1998, at 46, 46 (reporting that the Law School Admission Council had sent mailings to more than 70,000 law school applicants which criticized law school ranking generally and *U.S. News and World Report's* ranking methodology in particular).

7. See, e.g., Letter from Pamela G. Gann, Dean of Duke Law School, sent only to the deans of Yale, Harvard, Cornell, Pennsylvania, New York University, Columbia, Georgetown, Chicago, Northwestern, Stanford, Berkeley, UCLA, and Michigan (Apr. 13, 1993) (commenting on accreditation standards) (on file with author).

The MacCrate Report has provoked some remarkable public debates. My own favorite was the consternation about whether to add to the American Bar Association standards for accrediting law schools a declaration that part of a law school's purpose should be to prepare students to participate effectively in the legal profession.⁸ While that proposal was pending, there was a flurry of letters from law deans explaining why it was a really bad idea.⁹ It occurred to me that a codicil to the new version of the standard might be in order, requiring all law deans having written such letters to include them in the recruitment materials provided to potential applicants.

Ultimately, the central contribution of the MacCrate Report has been to help all of us view "legal education" as something that does not conclude with law school graduation but rather continues well thereafter. Whether we do it through the law-school admissions process, through law instruction in school, through the bar admissions process, or through continuing legal education, we should view lawyer education as a lifelong continuum in which various players take principal roles at different moments but which, in fact, ought to be one long and useful venture.

At any rate, the MacCrate debate has very constructively propelled forward the conclave movement, meetings between bar associations, law schools, and the judiciary about the future of legal education.¹⁰ While there is a communication benefit simply from the time these estates have spent together, it seems to me that in our state we already have a remarkably good set of connections between bench, bar and academy.¹¹ They are not structured very purposefully, but they exist across a wide range of law school activities and judicial and bar events. As a result, when you gather together five or six dozen people who would like to talk

8. Taking up one of the most straightforward of the MacCrate suggestions, the Illinois State Bar Association submitted to the ABA House of Delegates a resolution adding new language as follows: "A law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar *and to prepare them to participate effectively in the legal profession.*" AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 301(a) (1997) (emphasis added).

9. The dean of a distinguished law school wrote:

The proposed amendment is framed in such a way as to make it difficult to disagree with it, although I do so nevertheless. Given its genesis in the MacCrate Report, I can draw no other conclusion than that it is a general provision by which the "skills" emphasis of that report would be imported in the accreditation rule.

Letter from Randall P. Bezannson, Dean, Washington and Lee University School of Law, to James P. White (April 19, 1993) (on file with author).

10. See William R. Rakes, *Conclaves on Legal Education: Catalyst for Improvement of the Profession*, 72 NOTRE DAME L. REV. 1119 (1997).

11. The most difficult bridges to maintain are those between the academy and the rest of the profession. As former Dean Donald J. Weidner has said, "Because of the tremendous gap between academic lawyers and practicing lawyers, an affirmative action program to integrate law faculties into the profession will be required." Donald J. Weidner, *The Crises of Legal Education: A Wake-Up Call for Faculty*, 47 J. LEGAL EDUC. 92, 103 (1997).

about educating lawyers, most people who walk in the door know a reasonably high percentage of the other players. This is obviously a tremendous advantage in seeking to identify what one might do constructively and collectively. For these purposes, Indiana is a really nice size. It is large enough to have substantial resources, but small enough so that the people interested in various topics have a head start of knowing each other and knowing what their interests are.

I suggest that the central question the conclaves seek to explore can be stated in about eighteen words: Do we believe that the education of law students and of lawyers is what it needs to be? The equally simple, thoughtful answer to that is: Mostly, yes, but not completely.

Many practitioners have reacted to this question by focusing on the work of law schools. "Well, of course the schools don't do what they need to do." There are a number of ways in which this dialogue proceeds, but let me recite a common one.

Schools: "We're doing a lot better than we used to do, and we're doing better than all you know."

Bar: "Oh, I didn't know that, and I'm glad, but it's not enough."

Schools: "Yes, we agree it's not enough, but we can't do any more unless there's additional money."

With respect to the financial rebuttal in this exchange, I am not persuaded yet to take the answer as a full and complete defense. Still, in the course of these discussions, we non-academics learn some very important things. First of all, most practitioners have no idea how common it is for universities to siphon off money generated by law schools.

The fact that the law school can be a university cash cow never dawned on me until about four years ago, when the University of Bridgeport was in danger of closing its doors. Bridgeport was a substantial university in Connecticut whose enrollment had fallen from something like eleven thousand to just three or four thousand. In this state of near-collapse, the university literally put itself on the auction block, saying: "Who would like to buy us and run a university with these facilities?"

It soon became apparent that among Bridgeport's assets about the only thing for which there was a real market was the law school. This was true even though the law school itself was in distress. The level of its distress was demonstrated by the task confronting the eventual new owners, who ran the school in Bridgeport's facilities for a while: replacing some 275 burned-out light bulbs in the school's relatively small building.¹² The reason the school had value was partially because it had the capacity to generate cash. There are a good many places in this country where universities treat their law schools as that sort of asset. Until quite recently, for example, George Washington University siphoned

12. The new "owner" is Quinnipiac College in Hamden, Connecticut. The school now operates a greatly improved program from a handsome new building in Hamden.

off forty percent of its law school's revenue, a practice President Stephen J. Trachtenberg defended by saying: "You can't have a great law school unless it's part of a great university."¹³ We practitioners do not have the faintest idea of the extent to which these practices siphon off revenue from legal education and limit the ability of law schools to build better programs.¹⁴

We practitioners also have relatively little understanding of the dynamic of the market in which law schools compete for faculty. This market is a very real constraint on their ability to change. For all the fury that is expended over university tenure systems, it seems likely that even if the law school accreditation system abandoned the standards on job protection, the competition for professors is so fierce and the attractiveness of tenure is so central to the market that schools would largely continue their current practices.

The same market forces constrain a school's ability to generate more hours of instruction. In assessing the schools' claims of insufficient faculty to expand clinics, for example, it is tempting to say: "It should be easy to add to the teaching capacities of the school. Why don't you add just three teaching hours a week for every member of the law faculty?"¹⁵ The mathematics of this is sound, but the economics is not. The law firm equivalent of such an edict would be: "For the coming year, the management committee plans to pay everybody exactly what we were paying last year, but all partners and associates will be expected to bill 2,500 hours instead of 2,000." Law firm managers making such an announcement would either be swept out of office in the ensuing revolt or trampled in the stampede of partners departing for other firms. Law schools face very similar constraints.

Having said all that, I remain skeptical of the common declaration of law school managers: "No, we cannot do more of the practice-oriented instruction the bar requests without some new money." Such a response passes over an important issue: Where is the school presently committing its resources, and why? In other words, one can acknowledge the existence of constraints and still question the choices made about deployment of existing educational resources. Some practitioners are skeptical of the response because they see course catalogs littered with "Law and X" courses that surely represent low student-teacher ratios. Other practitioners are skeptical about the present deployment of law school resources because they find the scholarly product of faculties to be arcane. Make no mistake, I believe that law faculty contribute new intellectual capital to

13. Katherine S. Mangan, *An Unfair 'Tax'? Law and Business Schools Object to Bailing Out Medical Centers*, THE CHRON. OF HIGHER EDUC., May 15, 1998, at A43, A44 (stating that under pressure from ABA, the university agreed to scale down its tax to 25% by 2003).

14. See James P. White, *Legal Education in the Era of Change: Law School Autonomy*, 1987 DUKE L. J. 292, 304 n.46 (1987) (quoting former AALS President and then Dean of the University of Miami Soia Mentschikoff's statement that "the temptation to use the funds generated by the law school enrollment to pay for the college becomes almost irresistible." 1974 AALS PROCEEDINGS-ANN. MEETING pt. 2, at 70).

15. The chairman of the Ways and Means Committee of the Indiana House of Representatives made such a suggestion.

the work we do as practitioners. Still, it is telling that the most widely read law journal in the country is not the *Harvard Law Review* or any other faculty-oriented publication, but rather *The Business Lawyer*.¹⁶ It is written by business lawyers and edited by business lawyers.

To be sure, Dean John Sexton has made a powerful and enlightening argument for what he calls "courses of context."¹⁷ Still, most practitioners would say such courses are relatively less useful than trial practice instruction when viewed from a different sort of context—the daily representation of clients. The professional judgment reached by practitioners on such matters lead them to be skeptical about the allocation of time, money, and energy by the schools.

Though I obviously share some of that skepticism, it is still easier for me to identify actions that the bench and the bar can take than it is for me to think of things that schools can do.¹⁸ I list five here as a contribution to the discussion. Four of those are largely projects for the bench and bar, and one of them is mostly for the law schools.

I. PRE-LAW COUNSELING

We all know that colleges try to teach interested undergraduates a little something about the law school experience and the legal profession through pre-law counseling or orientation. We know that in a few colleges that effort is very good, and we also know that in a few colleges it is abysmal.

Improving the knowledge base for college seniors (or, for that matter, building a better orientation system for first-year law students) should be a relatively straightforward proposition for the academy and the profession. A modest amount of time and money would help pre-law students make sound decisions and help new law students figure out how to approach this new

16. *The Business Lawyer* is a publication of the ABA Section of Business Law. A comparison of circulation numbers quickly proves the point: The current circulation of *The Business Lawyer* is approximately 54,000 while *The Harvard Law Review*'s and *The University of Pennsylvania Law Review*'s current subscription numbers are 5454 and 1408 respectively. Telephone interview by John Kenley with Sue Daily, Members Services and Marketing Manager of the *Business Lawyer* (Mar. 26, 1998); telephone interview by John Kenley with Dennis O'Brien, Office Manager of the *Harvard Law Review* (Mar. 26, 1998); telephone interview by John Kenley, law clerk to Chief Justice of Indiana Randall T. Shepard, with Dan West, Senior Office Assistant of the *University of Pennsylvania Law Review* (Mar. 25, 1998).

17. See Bill Brooks, *Conclave on Legal Education: John Sexton on Behalf of the Situation Method*, RES GESTAE, Apr. 1997, at 31, 31; see also John E. Sexton, *The Preconditions of Professionalism: Legal Education for the Twenty-First Century*, 52 MONT. L. REV. 331 (1991).

18. And yet it seems to me that we ought to expect the academy to say something like, "Yes, I'm not doing such-and-such now or I'm not doing enough of it now, but I have some ideas about how I might." A discussion that proceeds on a basis of good faith and fair contribution ought to be one that moves beyond declaring, "Here's how I have managed to change," and proceeds promptly to, "Here's how I think I might yet change."

endeavor.¹⁹

The best orientation at my law school was connected to the library. I may remember it especially well because the head librarian was a fellow who told really great stories while he was explaining how the library worked. They did not take attendance, but absolutely everybody went anyhow, because we were like sponges in those first few months at law school. New law students do not typically brush up against judges or lawyers until much later in their student careers. The academy and our profession could make a lot of difference for both 1Ls and pre-1Ls without spending much money.

II. TRIAL PRACTICE COURSES

It ought to be possible for every student to take trial practice or other clinical courses. Widespread resistance to this proposition by law schools led the ABA simply to require that every school offer such opportunities, with the explicit understanding that a school need not accommodate every student who wanted to participate.²⁰

The schools' objections were many. I name one for purposes of argument: "There are people going through my law school who have no use for practice training because they will end up as transactional lawyers or in-house counsel, or in some other capacity where these skills are not central to their work." All well and good. I submit, however, that it is quite another matter to say, "I have students in my school who know they need skills training, want to take it, and cannot."²¹ I say to my friends in the academy: this simply will not wash.

Dean Sexton described an integrated system in which schools make it possible for all the students who want practice experiences to have the chance, with the help of practitioners. It would be an important thing for us to do. There are fewer than one-hundred fifty full-time law professors in our state. By contrast, there are 16,000 practitioners holding Indiana law licenses. You need

19. The Georgia Chief Justice's Commission on Professionalism, created in 1989, has specifically designated law school orientation as a time when soon-to-be lawyers are to receive training in aspects of professionalism. *See STATE BAR OF GEORGIA HANDBOOK* 110-12 (1995-1996). The Commission's larger mandate is "to promote professionalism among Georgia's lawyers . . . [by providing] sustained attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of client and public good." *Id.* at 112. The A.B.A. Standing Committee on Professionalism awarded the Commission an E. Smyth Gambrell Professionalism Award in 1993 for its work. Cindy Collins, *Temple, Queen's Bench Among Winners of ABA Professionalism Awards*, LAW, HIRING & TRAINING REP., Oct. 1993, at 12.

20. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(d) (1997) ("A law school shall offer live-client or other real-life practice experiences. This might be accomplished through clinics or externships. A law school need not offer this experience to all students.").

21. In the Indiana conclave, a law faculty member said that these are extremely popular courses and always oversubscribed, which is another way of saying there are students who want to do it, who think they need it, and cannot get it.

not tap much of that lawyer-power to produce a very dramatically large set of willing and capable hands.²²

III. TRAINING FOR YOUNG LAWYERS

There ought to be more opportunity for brand-new lawyers to receive practical training at the beginning of their legal careers. In this respect, Indiana's rules on continuing legal education send absolutely the wrong message: that all Indiana lawyers need ongoing education except new lawyers.²³ During their early years as practitioners, young lawyers ought to be directed to "Bridge the Gap" with trial practice courses or some form of NITA-style (National Institute of Trial Advocacy) education.²⁴

22. The University of Wisconsin is currently engaged in applying many of the ideas I've discussed in Part II. *See* Ralph M. Cagle, *Teaching Practice Skills in Law School: The University of Wisconsin Experience*, BAR EXAMINER, Feb. 1998, at 6-14; *see also* Joanne Martin & Bryant G. Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443, 447-48 (1994); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

23. IND. ADMIS. & DISC. R. 29 (3)(b). The fact that many lawyers present at the conclave felt that the three-year exemption should be repealed did not go unnoticed by young lawyers themselves. Jeff Hawkins, the 1997-98 Indiana State Bar Association's Young Lawyers Section Chair, reported at length on proposals voiced at the conclave. Hawkins noted that the concern for young lawyers is not whether the exemption will be repealed, but what sensitivity will be employed to help new lawyers comply with and benefit from the expected new requirements. Jeff R. Hawkins, *The Times—They Are a Changin'*, YLS - NETWORK: IND. STATE B. ASS'N YOUNG LAW. SEC. COMMUNIQUE, Spring 1998, at 1-2.

24. *See, e.g.*, S.C. APP. CT. R. 403:

(a) An attorney, although admitted to practice, may not appear alone in the actual conduct and trial of a case until a certificate has been filed with the Clerk of the Supreme Court showing the attorney has had eleven (11) trial experiences. The certificate shall state the name of the proceeding, the dates and the tribunals involved and shall be attested to by the respective judge, master, referee or hearing officer. A trial experience is defined as:

(1) actual participation in a full trial in a South Carolina tribunal under the direct supervision of a member of the South Carolina Bar; or

(2) observation of an entire contested testimonial-type hearing in a South Carolina tribunal. Should the hearing conclude prior to a final decision by the trier of fact, it shall be sufficient if one party has completed the presentation of its case.

...

(c) Trial experiences may be had any time after completion of one-half (½) of the credit

This, too, is something that the bar and the judiciary could decide to do that would solve a piece of the problem we all identify. Devising the right formula and finding the money would be relatively easy. The target audience is small, and there are plenty of models. I think we would be a better profession if we put such a program in place.

IV. BAR PERFORMANCE TESTING

The notion of "performance" was used by John Sexton in an intriguing way when he described "situational" instruction. He had a rather different way of describing what such techniques are all about—you want to teach a student to *do*, as best you can, based on what lawyers mostly end up *doing*. The profession's bar examiners have not traditionally tested a student's facility for "doing."

Instead, we have tended to replicate what contracts teachers and torts teachers and procedure teachers do: we give another written test on the law of contracts. We do not test bar applicants on the broader facility for tackling a given problem and trying to solve it with a given set of tools. It is what we lawyers mostly do all day.

There is now available for the first time in the world of bar examinations a vehicle for testing a student's capacity to solve problems. It is a new product of the National Conference of Bar Examiners called the Multistate Performance Test.²⁵ A few states agreed to pioneer this test just last year; and its adoption in other jurisdictions is proceeding rapidly.²⁶ If we in the bench and bar mean what

hours needed for law school graduation. An attorney who has practiced law in another state, territory or the District of Columbia for three (3) years at the time the attorney is admitted to practice law in South Carolina need not comply with the trial experience requirement if satisfactory proof of equivalent experience in the other jurisdiction is submitted to the Clerk of the Supreme Court.

25. See Hulett H. Askew, *Why Georgia Adopted Performance Testing*, BAR EXAMINER, Feb. 1998, at 30-35. Joseph D. Harbaugh, *Examining Lawyers' Skills*, BAR EXAMINER, Nov. 1990, at 9; see also Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349 (1996) (arguing that performance testing offers a valid technique to test legal skills currently omitted from most states' bar examinations).

26. California, Alaska and Colorado used some form of performance testing at the time the MacCrate Task Force examined the matter. See MacCrate Report, *supra* note 5, at 280-82. Georgia, New Mexico, and Virginia were the first three states to experiment with performance testing in concert with the National Conference of Bar Examiners (NCBE) and the American College of Testing. Cindy Collins, *Extra Credit Section on Bar Exam Targets Practical Skills*, LAW, HIRING & TRAINING REP., Jan. 1994, at 7, 8. The Multistate Performance Tests (MPT) eventually devised by the NCBE were first administered in February 1997 in Georgia, Hawaii, Iowa, and Missouri. Askew, *supra* note 25, at 30, 31. Four other jurisdictions joined the program in July of 1997: Colorado, the District of Columbia, Nevada, and New Mexico. *Id.* Five more were scheduled to administer the MPT in February of 1998: Illinois, Mississippi, Oregon, Texas, and West Virginia. *Id.* The states of Idaho and North Dakota, as well as Guam and the Republic of Palau have announced they will add the MPT to their bar examinations. *Id.* The test is awaiting

we say about the relative importance of imbuing law students and new lawyers with this broader facility, than we ought to test for it. Applicants should have to demonstrate a little talent for solving legal problems before we turn them loose on clients.

V. BETTER CLE

It has now been ten years since the Indiana Supreme Court adopted a rule on mandatory continuing legal education.²⁷ One of the premises of the rule we adopted was that it would entail a relatively light form of regulation.²⁸

Because of that policy, the structure has operated as a relatively open set of choices offered to lawyer-consumers without much in the way of regulatory control. As with pre-law orientation, there is a great deal of continuing legal education that is really good, and there is some that is plain embarrassing. The standards under which those courses are accredited reflect a light touch. The benefit of modest regulation is thought to be that everybody can play the game—little bar associations and big ones, proprietary organizations, large providers like ICLEF and the city bars. This ought to multiply the choices and drive down costs.

On the other hand, we have not done a very serious job of assuring that the enormous investment we all make every year in continuing legal education pays off as well as it ought to. If you add up the time that lawyers and judges spend complying with the rules on continuing legal education, either by spending time away from billable hours or by writing checks for the cost of doing so, it is apparent that Indiana lawyers and judges spend at least \$20 million a year on continuing legal education. And we afford our CLE commission only a modest capacity to assure that is \$20 million is well spent.

There is no doubt that we could build better standards for continuing legal education in our state.

CONCLUSION

The Indiana legal community doubtless has the capacity to implement these five ideas—or for that matter a different set of five better ones. This capacity is one of the happy facts about our state. And I think there's every reason to believe that the spirit that brought lawyers, judges, and educators together in the recent conclave can cause things to happen. It was the sort of spirit described in 1928 by Benjamin Cardozo, then serving as the Chief Judge of the New York Court of Appeals, in a graduation speech to the very first class at St. John's University School of Law, now one of the finest schools in the country.

final approval in Alabama, Minnesota, Pennsylvania, and South Dakota. *Id.*

27. IND. ADMIS. & DISC. R. 29.

28. This is not easy to maintain, by the way, because people are always at your door saying, "Well, why don't you make everybody take at least two hours of this or at least one hour of that." This is what everybody ought to have to do." Those we mostly resist, although not always.

[The law] is what you and I are making it. That is the heavy burden of our calling, but that is also its unfading glory. . . . As I look into your faces, I figure to myself what it will mean, in days to come, to the profession of the law if you and those to follow you out of this school will think worthily and highly of this great vocation of your choice. What a spiritual power you will then be in the age-old fellowship you are to enter! What a leavening force you will become in this great conglomerate bar of ours, moved as it is, at times, by the ferment of high thoughts and fine ideals, and yet at times in danger of becoming sodden and inert by reason of that very mass which might make it so irresistible a power for good! How it lies within you to uplift what is low, to erase what is false, to redeem what has been lost, till all the world shall see, and seeing shall understand, that union of scholar's thought, the mystic's yearning, the knight's ardor, and the hero's passion, which is still, in truest moments of self-expression, the spirit of the bar!²⁹

May this always be the spirit in which our bar convenes.

29. Benjamin N. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 239, 241 (1939).

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 1997*

KEVIN W. BETZ**
BARRY L. LOFTUS***

In 1997, the fully modern Indiana Supreme Court emerged to show that it could handle the crush of mandatory criminal cases. The court not only disposed of its increased criminal docket, but it also resumed its docket of discretionary cases after a drop in 1996.¹ A major reason for the court's ability to handle the increased influx of criminal cases was the newest member of the court, Justice Boehm, who served his first full calendar year. He emerged as the most productive member of the court in 1997, which is noteworthy in and of itself, but it was especially significant because he replaced Justice DeBruler, who was the least productive² member of the court during his more than three decades as a member of the court. In short, the court was at its most productive since the beginning of this study in 1991. The court is also showing no signs of letting up;

* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Krieg DeVault Alexander & Capehart for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard; but, of course, any errors or omissions belong to his former law clerk. We also thank WESTLAW® for its kind willingness to allow us free access to its computer resources and assistance in preparing these Tables. In addition, we thank Amanda Linthicum for her clerical work and support.

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1.

	MANDATORY	DISCRETIONARY	TOTAL
1991	109 (53%)	98 (47%)	207
1992	64 (41%)	93 (59%)	157
1993	60 (44%)	77 (56%)	137
1994	60 (45%)	73 (55%)	133
1995	46 (38%)	76 (62%)	122
1996	68 (59%)	48 (41%)	116
1997	100 (58%)	71 (42%)	171

2. This comment only applies to numbers of opinions and certainly in no way implies anything about the quality of those opinions.

it has increased its discretionary docket, even though the court's mandatory criminal caseload shows no signs of lessening.

The court's mandatory criminal caseload has gone from 46 to 68 to 100 opinions in the last three years. The court's discretionary caseload has gone from 76 to 48 to 71 opinions in the last three years. The court seems to be fighting back to maintain its position as a court of last resort until another constitutional amendment is passed.³

As to specific types of cases, the most significant highlight is that the court's disposition of death-penalty opinions doubled from any previous year to 18 opinions. This is a potential indication that prosecutors in this State have been increasingly seeking the death penalty. Nine of the 18 were reviewed on petitions for post-conviction relief, and the other half were direct appeals from the trial court. In three of the death penalty cases, the court rendered decisions that in some way fell short of full affirmation of the lower court.⁴ The other 15 were fully affirmed. The court also doubled its number of opinions involving a substantive discussion of Indiana constitutional issues. It issued 24 such opinions.

The following is a description of the highlights from each table.

Table A. In 1997, the supreme court issued 171 opinions that were authored by an individual justice. Over each of the past five years, beginning in 1992, the court issued 157, 137, 133, 122, and 116 opinions. Thus, the court has reversed its trend of decreasing its number of annual opinions. Of the 171 opinions issued by individual justices in 1997, 125 opinions analyzed criminal issues and 46 analyzed civil matters.

As stated above, Justice Boehm who just joined the court last year was the most productive member with 43 opinions, 32 criminal and 11 civil. Chief Justice Shepard and Justice Dickson were next with 36 total opinions each. Justice Sullivan produced 31, and Justice Selby authored 24 opinions.

Justices Dickson and Sullivan wrote the most dissents with 12 each. Justice Sullivan had the most concurrences with 11.

Table B-1. For civil cases, Justices Boehm and Selby were the most aligned at 95.1%. Chief Justice Shepard and Justice Selby were next at 93.5%. Justices Boehm and Sullivan were the least aligned at 71.1%. Overall, Chief Justice Shepard was the most aligned with Justice Boehm close behind. Justice Sullivan

3. The court fought this battle against an overwhelming number of mandatory criminal cases in 1988. The court is fighting the battle again. See Kevin W. Betz & Andrew T. Deibert, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1996*, 30 IND. L. REV. 933 (1997); see also Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988); Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

4. State v. Van Cleave, 681 N.E.2d 181 (Ind. 1997); Games v. State, 684 N.E.2d 466 (Ind. 1997); Thompson v. State, 690 N.E.2d 224 (Ind. 1997).

was the least aligned with all of his fellow justices.

Table B-2. For criminal cases, Justice Boehm and Chief Justice Shepard were the most aligned at 96.8%. Justices Dickson and Sullivan were the least aligned at 85.6%.

Table B-3. For all cases, Chief Justice Shepard and Justice Boehm, along with Justices Selby and Boehm, were the most aligned, each pair at 95.8%. Justices Dickson and Sullivan were the least aligned at 82.1%.

Table C. With the continuing increase of less-divisive mandatory cases, the court again reached an even higher level of unanimity. The court was either unanimous or unanimous with a concurrence in 87.8% of its opinions. This is the highest level of unanimity in the seven years of this study.

Table D. The court had six 3-2 decisions, the lowest number since the annual survey began. Of those, no block of three justices is apparent. In fact, none of the six split opinions included the same three justices. In addition, Chief Justice Shepard, Justices Dickson and Selby, who had in previous years collaborated more than any other three-justice majority, did not form any three-justice majority in 1997.

Table E-1. Interestingly, the court reversed 10% more direct criminal appeals, even though the number of such appeals jumped 47% from 68 to 100 on the court's docket.

Table E-2. As discussed earlier, the court increased its number of civil petitions accepted for transfer from 32 to 45, even though its docket of mandatory criminal cases has increased from 68 to 100. There were 368 civil petitions to transfer and 379 criminal petitions to transfer, equaling a total of 747. This is an overall drop of 60 petitions to transfer from last year.

Table F. As also discussed earlier, the most interesting highlight from this specific subject area Table is that the court disposed of 18 death-penalty opinions. Of those 18, nine were direct appeals and nine were petitions for post-conviction relief. This number of death-penalty opinions is twice as many as any previous number and triple the usual number. It is likely that this is the most death-penalty opinions produced in the history of the court. This could indicate that prosecutors in this State are exercising this prerogative with greater frequency. The court also had a two-fold jump in opinions that substantively discussed an Indiana constitutional law issue. This is a continuation of this court's commitment to developing this State's organic law. In addition, the court wrote four opinions on issues involving railroad rights of way and two significant opinions regarding high school athletics.

TABLE A
OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	29	7	36	2	3	5	0	4	4
Dickson, J.	25	11	36	1	1	2	4	8	12
Sullivan, J.	20	11	31	7	4	11	6	6	12
Selby, J. ^e	19	5	24	2	0	2	1	1	2
Boehm, J. ^e	32	11	43	3	0	3	1	2	3
Per Curiam		37	37						
Total	125	82	207	15	8	23	12	21	33

^a These are opinions and votes on opinions by each justice and in per curiam in the 1997 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. *See Melinda Gann Hall, Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *See id.* at 210.

^b This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions. Also, the following eight miscellaneous cases are not included in the table: *Burris v. State*, 684 N.E.2d 193 (Ind. 1997) (order setting execution date); *Burris v. State*, 687 N.E.2d 190 (Ind. 1997) (denial of successive petition for post conviction relief); *Taylor v. State*, 677 N.E.2d 38 (Ind. 1997) (order directing clerk to certify appeal as final and remanding case to trial court); *In re Ellis*, 685 N.E.2d 476 (Ind. 1997) (dissent from denial of transfer); *Indiana Dep't of State Revenue v. Associated Ins. Cos.*, 685 N.E.2d 51 (Ind. 1998) (dissent from denial of transfer); *United Farm Bureau Mut. Ins. Co. v. Blossom Chevrolet, Inc.*, 679 N.E.2d 1327 (Ind. 1997) (dissent from denial of transfer); *Mortell v. Mutual Sec. Life Ins. Co.*, 678 N.E.2d 797 (Ind. 1997) (order dismissing appeal); *Harden v. Whipker*, 676 N.E.2d 19 (Ind. 1997) (order dismissing appeal as moot).

^c This category includes both written concurrences and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Justices declined to participate in the following non-disciplinary cases: Justice Sullivan (*State v. Hoovler*, 673 N.E.2d 767 (Ind. 1997); *Sullivan v. Day*, 681 N.E.2d 713 (Ind. 1997); *J.A.W. v. State*, 687 N.E.2d 1202 (Ind. 1997); *Family & Social Servs. Admin. v. Community Care Ctrs., Inc.*, 688 N.E.2d 1250 (Ind. 1997)); Justice Selby (*Stavropoulos v. State*, 678 N.E.2d 397 (Ind. 1997); *Como, Inc. v. Carson Square, Inc.*, 689 N.E.2d 725 (Ind. 1997)); Justice Boehm (*Calumet Nat. Bank v. American Tel. & Tel. Co.*, 682 N.E.2d 785 (Ind. 1997); *Consolidated Rail Corp., Inc. v. Lewellen*, 682 N.E.2d 779 (Ind. 1997); *Malachowski v. Bank One, Indianapolis*, 682 N.E.2d 530 (Ind. 1997); *Tazian v. Cline*, 686 N.E.2d 95 (Ind. 1997); *Bloemker v. Detroit Diesel Corp.*, 687 N.E.2d 358 (Ind. 1997)).

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES

		Shepard	Dickson	Sullivan	Selby	Boehm
Shepard,	O		38	32	43	38
	S		0	1	0	1
	D	---	38	33	43	39
	C.J.		47	43	46	42
	P		80.9%	76.7%	93.5%	92.9%
Dickson,	O	38		30	40	34
	S	0		1	0	0
	D	38	---	31	40	34
	J.	47		43	46	42
	P	80.9%		72.1%	87.0%	81.0%
Sullivan,	O	32	30		33	27
	S	1	1		0	0
	D	33	31	---	33	27
	J.	43	43		42	38
	P	76.7%	72.1%		78.6%	71.1%
Selby,	O	43	40	33		39
	S	0	0	0		0
	D	43	40	33	---	39
	J.	46	46	42		41
	P	93.5%	87.0%	78.6%		95.1%
Boehm,	O	38	34	27	39	
	S	1	0	0	0	
	D	39	34	27	39	---
	J.	42	42	38	41	
	P	92.9%	81.0%	71.1%	95.1%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 38 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^g

	Shepard	Dickson	Sullivan	Selby	Boehm
Shepard,	O	118	110	119	121
	S	0	0	0	0
	D	---	118	119	121
	C.J.		125	124	125
	P	94.4%	88.0%	96.0%	96.8%
Dickson,	O	118	107	116	118
	S	0	0	0	2
	D	118	---	116	120
	J.	125	125	124	125
	P	94.4%	85.6%	93.5%	96.0%
Sullivan,	O	110	107	110	110
	S	0	0	1	0
	D	110	107	---	110
	J.	125	125	124	125
	P	88.0%	85.6%	89.5%	88.0%
Selby,	O	119	116	110	119
	S	0	0	1	0
	D	119	116	111	---
	J.	124	124	124	124
	P	96.0%	93.5%	89.5%	96.0%
Boehm,	O	121	118	110	119
	S	0	2	0	0
	D	121	120	110	119
	J.	125	125	125	124
	P	96.8%	96.0%	88.0%	96.0%

^g This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 118 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES
NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES^b

		Shepard	Dickson	Sullivan	Selby	Boehm
Shepard,	O		156	142	162	159
	S		0	1	0	1
	D	---	156	143	162	160
	C.J.		172	168	170	167
	P		90.7%	85.1%	95.3%	95.8%
Dickson,	O	156		137	156	152
	S	0		1	0	2
	D	156	---	138	156	154
	J.	172		168	170	167
	P	90.7%		82.1%	91.8%	92.2%
Sullivan,	O	142	137		143	137
	S	1	1		1	0
	D	143	138	---	144	137
	J.	168	168		166	163
	P	85.1%	82.1%		86.7%	84.0%
Selby,	O	162	156	143		158
	S	0	0	1		0
	D	162	156	144	---	158
	J.	170	170	166		165
	P	95.3%	91.8%	86.7%		95.8%
Boehm,	O	159	152	137	158	
	S	1	2	0	0	
	D	160	154	137	158	---
	J.	167	167	163	165	
	P	95.8%	92.2%	84.0%	95.8%	

^b This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 156 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 1997. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C

UNANIMITY

NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASESⁱ

			Unanimous			Opinions			Total
Unanimous ^j			With Concurrence ^k			With Dissent			
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
102	32	134(77.9%)	13	4	17(9.9%)	10	11	21(12.2%)	172

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percent of overall opinions with concurrence and overall opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D

3-2 DECISIONS^l

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, C.J., Dickson, J., Boehm, J.	1
2. Dickson, J., Selby, J., Boehm, J.	1
3. Shepard, C.J., Sullivan, J., Selby, J.	1
4. Dickson, J., Sullivan, J., Selby, J.	1
5. Shepard, C.J., Dickson, J., Boehm, J.	1
6. Shepard, C.J., Selby, J., Boehm, J.	1
Totalⁿ	6

^l This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

ⁿ The 1997 term's 3-2 decisions were:

1. Shepard, C. J., Sullivan, J., Boehm, J.: *In re Kehoe*, 678 N.E.2d 394 (Ind. 1997) (per curiam).
2. Dickson, J., Selby, J., Boehm, J.: *McGraw-Edison Co. v. North-Eastern Rural Elec. Membership Corp.*, 678 N.E.2d 1120 (Ind. 1997) (Boehm, J.).
3. Shepard, C. J., Sullivan, J., Selby, J.: *Bacher v. State*, 687 N.E.2d 791 (Ind. 1997) (Sullivan, J.).
4. Dickson, J., Sullivan, J., Selby, J.: *West Clark Community Sch. v. H.L.K.*, 690 N.E.2d 238 (Ind. 1997) (Sullivan, J.).
5. Shepard, C.J., Dickson, J., Boehm, J.: *Berry v. State*, 689 N.E.2d 444 (Ind. 1997) (Dickson, J.).
6. Shepard, C.J., Selby, J., Boehm, J.: *National City Bank v. Shortridge*, 689 N.E.2d 1248 (Ind. 1997) (Shepard, C.J.).

TABLE E-1

DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed or Vacated ^p	Affirmed	Total
Civil Appeals Accepted for Transfer	37 (78.7%)	10 (21.3%)	47
Direct Civil Appeals	0	0	0
Criminal Appeals Accepted for Transfer	21 (87.5%)	3 (12.5%)	24
Direct Criminal Appeals	29 (29.0%)	71 (71.0%)	100
Total	87 (50.9%)	84 (49.1%)	171 ^q

^o Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 4(A) and also pursuant to Rules of Procedure for Original Actions. All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 11(B). The court's transfer docket, especially civil cases, has substantially increased in the past five years, but declined significantly last year. *See* Chief Justice Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

^p Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term "reverse" is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically "vacates" every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 11(B)(3). As a practical matter, "reverse" or "vacate" simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 60 attorney and judicial discipline opinions; one writ of mandamus or prohibition; four opinions related to certified questions; nor six miscellaneous cases. These opinions did not reverse, vacate, or affirm any other court's decision.

TABLE E-2

DISPOSITION OF PETITIONS TO TRANSFER
TO SUPREME COURT IN 1996^r

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil ^s	323 (87.8%)	45 (12.2%)	368
Criminal ^t	352 (92.9%)	27 (7.1%)	379
Juvenile	0	0	0
Total	675 (90.4%)	72 (9.6%)	747

^r This Table analyzes the disposition of petitions to transfer by the court. *See* IND. APP. R. 11(B). This Table is compiled from information provided by the Indiana Supreme Court in a report entitled, "Grant and Denial of Cases in Which Transfer to the Indiana Supreme Court Has Been Sought."

^s This also includes petitions to transfer in tax cases and worker's compensation cases.

^t This also includes petitions to transfer in post-conviction relief cases.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^u

	Number
Original Actions	
• Certified Questions	0
• Writs of Mandamus or Prohibition	1 ^v
• Attorney and Judicial Discipline	59 ^w
• Judicial Discipline	2 ^x
Criminal	
• Death Penalty	18 ^y
• Fourth Amendment or Search and Seizure	10 ^z
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	4 ^{aa}
Real Estate or Real Property	6 ^{bb}
Personal Property	1 ^{cc}
Landlord-Tenant	0
Divorce or Child Support	1 ^{dd}
Children in Need of Services (CHINS)	1 ^{ee}
Paternity	2 ^{ff}
Product Liability or Strict Liability	3 ^{gg}
Negligence or Personal Injury	8 ^{hh}
Invasion of Privacy	1 ⁱⁱ
Medical Malpractice	3 ^{jj}
Indiana Tort Claims Act	0
Statute of Limitations or Statute of Repose	2 ^{kk}
Tax, Department of State Revenue, or State Board of Tax Commissioners	1 ^{ll}
Contracts	8 ^{mm}
Corporate Law or the Indiana Business Corporation Law	1 ⁿⁿ
Uniform Commercial Code	0
Banking Law	0
Employment Law	1 ^{oo}
Insurance Law	6 ^{pp}
Environmental Law	1 ^{qq}
Consumer Law	1 ^{rr}
Workers Compensation	1 ^{ss}
Arbitration	1 ^{tt}
Administrative Law	6 ^{uu}
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	1 ^{vv}
Eleventh Amendment	1 ^{ww}
Civil Rights	1 ^{xx}
Indiana Constitution	24 ^{yy}

^u This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 1997. It is also a quick-reference guide to court rulings

for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. A citation list is provided in a footnote for each area.

^v *In re Madison County Probation Officers' Salaries*, 682 N.E.2d 498 (Ind. 1997).

^w *In re Anonymous*, 689 N.E.2d 442 (Ind. 1997); *In re Comstock*, 675 N.E.2d 341 (Ind. 1997); *In re Clifford*, 674 N.E.2d 972 (Ind. 1997); *In re Putsey*, 675 N.E.2d 703 (Ind. 1997); *In re Manson*, 676 N.E.2d 347 (Ind. 1997); *In re Reynolds*, 676 N.E.2d 20 (Ind. 1997); *In re Cartmel*, 676 N.E.2d 1047 (Ind. 1997); *In re Newell*, 677 N.E.2d 38 (Ind. 1997); *In re Tracy*, 676 N.E.2d 738 (Ind. 1997); *In re Miller*, 677 N.E.2d 505 (Ind. 1997); *In re Smith*, 678 N.E.2d 104 (Ind. 1997); *In re Raikos*, 678 N.E.2d 381 (Ind. 1997); *In re Kehoe*, 678 N.E.2d 394 (Ind. 1997); *In re Lansky*, 678 N.E.2d 1114 (Ind. 1997); *In re Miller*, 678 N.E.2d 1117 (Ind. 1997); *In re Cawley*, 678 N.E.2d 1112 (Ind. 1997); *In re Roche*, 678 N.E.2d 797 (Ind. 1997); *In re Schreiber*, 681 N.E.2d 687 (Ind. 1997); *In re Gemmer*, 679 N.E.2d 1313 (Ind. 1997); *In re Felling*, 679 N.E.2d 498 (Ind. 1997); *In re Levy*, 682 N.E.2d 490 (Ind. 1997); *In re Marshall*, 680 N.E.2d 1098 (Ind. 1997); *In re Caputi*, 676 N.E.2d 1058 (Ind. 1997); *In re Miller*, 681 N.E.2d 710 (Ind. 1997); *In re Fleener*, 682 N.E.2d 521 (Ind. 1997); *In re Shaeffer*, 681 N.E.2d 1113 (Ind. 1997); *In re Mittower*, 681 N.E.2d 1113 (Ind. 1997); *In re Jackson*, 682 N.E.2d 526 (Ind. 1997); *In re Thonert*, 682 N.E.2d 522 (Ind. 1997); *In re Baars*, 683 N.E.2d 555 (Ind. 1997); *In re Lustina*, 683 N.E.2d 236 (Ind. 1997); *In re Callahan*, 684 N.E.2d 191 (Ind. 1997); *In re Stivers*, 683 N.E.2d 1312 (Ind. 1997); *In re Toth*, 684 N.E.2d 493 (Ind. 1997); *In re Kight*, 685 N.E.2d 472 (Ind. 1997); *In re Fihe*, 685 N.E.2d 469 (Ind. 1997); *In re Knobel*, 685 N.E.2d 696 (Ind. 1997); *In re Fisher*, 684 N.E.2d 197 (Ind. 1997); *In re O'Brien*, 685 N.E.2d 54 (Ind. 1997); *In re Redding*, 685 N.E.2d 56 (Ind. 1997); *In re Thonert*, 685 N.E.2d 1066 (Ind. 1997); *In re Headlee*, 685 N.E.2d 1075 (Ind. 1997); *In re Conn*, 686 N.E.2d 109 (Ind. 1997); *In re Higginson*, 685 N.E.2d 1074 (Ind. 1997); *In re Razo*, 686 N.E.2d 108 (Ind. 1997); *In re Manns*, 685 N.E.2d 1071 (Ind. 1997); *In re Baldwin*, 685 N.E.2d 1069 (Ind. 1997); *In re Darling*, 685 N.E.2d 1066 (Ind. 1997); *In re Lamb*, 686 N.E.2d 113 (Ind. 1997); *In re Miller*, 687 N.E.2d 186 (Ind. 1997); *In re Miller*, 687 N.E.2d 191 (Ind. 1997); *In re O'Connell*, 687 N.E.2d 573 (Ind. 1997); *In re Deloney*, 689 N.E.2d 481 (Ind. 1997); *In re Anonymous*, 689 N.E.2d 434 (Ind. 1997); *In re Lewis*, 680 N.E.2d 858 (Ind. 1997); *In re Christoff*, 690 N.E.2d 1135 (Ind. 1997); *In re Lehman*, 690 N.E.2d 696 (Ind. 1997); *In re Peteet*, 679 N.E.2d 137 (Ind. 1997); *In re Tew*, 681 N.E.2d 689 (Ind. 1997).

^x *In re Haan*, 676 N.E.2d 740 (Ind. 1997); *In re Cox*, 680 N.E.2d 528 (Ind. 1997).

^y *State v. Moore*, 678 N.E.2d 1258 (Ind. 1997); *State v. Van Cleave*, 681 N.E.2d 181 (Ind. 1997); *Games v. State*, 684 N.E.2d 466 (Ind. 1997); *Burris v. State*, 684 N.E.2d 193 (Ind. 1997); *Saylor v. State*, 686 N.E.2d 80 (Ind. 1997); *Allen v. State*, 686 N.E.2d 760 (Ind. 1997); *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997); *Prowell v. State*, 687 N.E.2d 563 (Ind. 1997); *Matheney v. State*, 688 N.E.2d 883 (Ind. 1997); *Bieghler v. State*, 690 N.E.2d 188 (Ind. 1997); *Thompson v. State*, 690 N.E.2d 224 (Ind. 1997); *Hough v. State*, 690 N.E.2d 267 (Ind. 1997); *Timberlake v. State*, 690 N.E.2d 243 (Ind. 1997); *Stevens v. State*, 691 N.E.2d 412 (Ind. 1997); *Ben-Yisrayl v. State*, 690 N.E.2d 1141 (Ind. 1997); *Roche v. State*, 690 N.E.2d 1115 (Ind. 1997); *Burris v. State*, 687 N.E.2d 190 (Ind. 1997); *Wrinkles v. State*, 690 N.E.2d 1156 (Ind. 1997).

^z *Houser v. State*, 678 N.E.2d 95 (Ind. 1997); *Palmer v. State*, 679 N.E.2d 887 (Ind. 1997); *Canaan v. State*, 683 N.E.2d 227 (Ind. 1997); *Lampkins v. State*, 682 N.E.2d 1268 (Ind. 1997); *Daniels v. State*, 683 N.E.2d 557 (Ind. 1997); *Whipps v. State*, 685 N.E.2d 697 (Ind. 1997); *Figert v. State*, 686 N.E.2d 827 (Ind. 1997); *Jaggers v. State*, 687 N.E.2d 180 (Ind. 1997); *Stewart v. State*, 688 N.E.2d 1254 (Ind. 1997); *Ben-Yisrayl v. State*, 690 N.E.2d 1141 (Ind. 1997).

^{aa} *Malachowski v. Bank One, Indianapolis*, 682 N.E.2d 530 (Ind. 1997); *Estate of Decker v. Farm Credit Servs. of Mid-Am.* 684 N.E.2d 1137 (Ind. 1997); *Nill v. Martin*, 686 N.E.2d 116 (Ind. 1997); *Nelson v. Parker*, 687 N.E.2d 187 (Ind. 1997).

^{bb} **Consolidated Rail Corp., Inc. v. Lewellen**, 682 N.E.2d 779 (Ind. 1997); **Hefty v. Certified Settlement Class**, 680 N.E.2d 843 (Ind. 1997); **Calumet Nat. Bank v. American Tel. & Tel. Co.**, 682 N.E.2d 785 (Ind. 1997); **Tazian v. Cline**, 686 N.E.2d 95 (Ind. 1997); **Nelson v. Parker**, 687 N.E.2d 187 (Ind. 1997); **Yanoff v. Muncy**, 688 N.E.2d 1295 (Ind. 1997).

^{cc} **Gray v. National City Bank** 687 N.E.2d 356 (Ind. 1997).

^{dd} **Nill v. Martin**, 686 N.E.2d 116 (Ind. 1997).

^{ee} **West Clark Community Sch. v. H. L. K.**, 690 N.E.2d 238 (Ind. 1997).

^{ff} **Russell v. Russell**, 682 N.E.2d 513 (Ind. 1997); **J. W. L. v. A. J. P.**, 682 N.E.2d 519 (Ind. 1997).

^{gg} **McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp.**, 678 N.E.2d 1120 (Ind. 1997); **Haseman v. Orman**, 680 N.E.2d 531 (Ind. 1997); **Perdue Farms Inc. v. Pryor**, 683 N.E.2d 239 (Ind. 1997).

^{hh} **Wiersma Trucking Co. v. Pfaff**, 678 N.E.2d 110 (Ind. 1997); **Smith v. Pancner**, 679 N.E.2d 893 (Ind. 1997); **Miller v. Memorial Hosp. of South Bend, Inc.**, 679 N.E.2d 1329 (Ind. 1997); **Haseman v. Orman**, 680 N.E.2d 531 (Ind. 1997); **Perdue Farms Inc. v. Pryor**, 683 N.E.2d 239 (Ind. 1997); **Warner Trucking, Inc. v. Carolina Cas. Ins. Co.**, 686 N.E.2d 102 (Ind. 1997); **McGlothlin v. M & U Trucking, Inc.**, 688 N.E.2d 1243 (Ind. 1997); **Bloemker v. Detroit Diesel Corp.**, 687 N.E.2d 358 (Ind. 1997).

ⁱⁱ **Doe v. Methodist Hosp.**, 690 N.E.2d 681 (Ind. 1997).

^{jj} **Smith v. Pancner**, 679 N.E.2d 893 (Ind. 1997); **Miller v. Memorial Hosp. of South Bend, Inc.**, 679 N.E.2d 1329 (Ind. 1997); **Cram v. Howell**, 680 N.E.2d 1096 (Ind. 1997).

^{kk} **Cox v. American Aggregates Corp.**, 684 N.E.2d 193 (Ind. 1997); **Estate of Decker v. Farm Credit Servs. of Mid-Am.**, 684 N.E.2d 1137 (Ind. 1997).

^{ll} **Board of Tax Comm'r's v. Two Market Square Assocs.**, 679 N.E.2d 882 (Ind. 1997).

^{mm} **Harbour v. Arelco, Inc.**, 678 N.E.2d 381 (Ind. 1997); **McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp.**, 678 N.E.2d 1120 (Ind. 1997); **USA Life One Ins. Co. v. Nuckolls**, 682 N.E.2d 534 (Ind. 1997); **Thomson Consumer Elec., Inc. v. Wabash Valley Refuse Removal, Inc.**, 682 N.E.2d 792 (Ind. 1997); **Northern Ind. Commuter Transp. Dist. v. Chicago Southshore & South Bend R.R.**, 685 N.E.2d 680 (Ind. 1997); **Trotter v. Nelson**, 684 N.E.2d 1150 (Ind. 1997); **Johnson v. Blankenship**, 688 N.E.2d 1250 (Ind. 1997); **Orr v. Westminster Village North, Inc.**, 689 N.E.2d 712 (Ind. 1997).

ⁿⁿ **Fleming v. International Pizza Supply Corp.**, 676 N.E.2d 1051 (Ind. 1997).

^{oo} **Orr v. Westminster Village North, Inc.** 689 N.E.2d 712 (Ind. 1997).

^{pp} **Colonial Penn Ins. Co. v. Guzorek**, 690 N.E.2d 664 (Ind. 1997); **Smith v. Pancner**, 679 N.E.2d 893 (Ind. 1997); **USA Life One Ins. Co. v. Nuckolls**, 682 N.E.2d 534 (Ind. 1997); **Warner Trucking, Inc. v. Carolina Cas. Ins. Co.**, 686 N.E.2d 102 (Ind. 1997); **Conrad v. Universal Fire & Cas. Ins. Co.**, 686 N.E.2d 840 (Ind. 1997); **Erie Ins. Co. v. George**, 681 N.E.2d 189 (Ind. 1997); **Frankenmuth Mut. Ins. Co. v. Williams**, 690 N.E.2d 675 (Ind. 1997); **In re Lehman**, 690 N.E.2d 296 (Ind. 1997).

^{qq} **Haseman v. Orman**, 680 N.E.2d 531 (Ind. 1997).

^{rr} **Harbour v. Arelco, Inc.**, 678 N.E.2d 381 (Ind. 1997).

^{ss} **Cox v. American Aggregates Corp.**, 684 N.E.2d 193 (Ind. 1997).

^{tt} **Northern Ind. Commuter Transp. Dist. v. Chicago Southshore & South Bend R.R.**, 685 N.E.2d 680 (Ind. 1997).

^{uu} **Board of Tax Comm'r's v. Two Market Square Assocs.**, 679 N.E.2d 882 (Ind. 1997); **Sullivan v. Day**, 681 N.E.2d 713 (Ind. 1997); **In re Madison County Probation Officers' Salaries**, 682 N.E.2d 498 (Ind. 1997); **Indiana High Sch. Athletic Ass'n v. Reyes**, No. 79S02-9605-CV-361, 1998 WL 7094 (Ind. Dec. 19, 1997); **Indiana High Sch. Athletic Ass'n v. Carlberg**, No. 29S02-9610-CV-681, 1997 WL 781628 (Ind. Dec. 19, 1997); **West Clark Community Sch. v. H. L. K.**, 690 N.E.2d 238 (Ind. 1997).

^{vv} Northern Ind. Commuter Transp. Dist. v. Chicago Southshore & South Bend R.R., 685 N.E.2d 680 (Ind. 1997).

^{ww} J. A. W. v. State, 687 N.E.2d 1202 (Ind. 1997).

^{xx} J. A. W. v. State, 687 N.E.2d 1202 (Ind. 1997).

^{yy} Pierce v. State 677 N.E.2d 39 (Ind. 1997); Joyner v. State 678 N.E.2d 386 (Ind. 1997); Palmer v. State, 679 N.E.2d 887 (Ind. 1997); Jervis v. State 679 N.E.2d 875 (Ind. 1997); *In re Madison County Probation Officers' Salaries*, 682 N.E.2d 498 (Ind. 1997); Lee v. State, 684 N.E.2d 1143 (Ind. 1997); Saylor v. State, 686 N.E.2d 80 (Ind. 1997). Alvarado v. State 686 N.E.2d 819 (Ind. 1997); State v. Moss-Dwyer, 686 N.E.2d 109 (Ind. 1997); Smith v. State 686 N.E.2d 1264 (Ind. 1997); State v. Hurst, 688 N.E.2d 402 (Ind. 1997); Carter v. State, 686 N.E.2d 834 (Ind. 1997); Matheney v. State, 688 N.E.2d 883 (Ind. 1997); Baird v. State, 688 N.E.2d 911 (Ind. 1997); Valentin v. State 688 N.E.2d 412 (Ind. 1997); Taylor v. State, 689 N.E.2d 699 (Ind. 1997); Williams v. State, 690 N.E.2d 102 (Ind. 1997); Ridley v. State, 690 N.E.2d 177 (Ind. 1997); Indiana High Sch. Athletic Ass'n v. Carlberg, No. 29S02-9610-CV-681, 1997 WL 781628 (Ind. Dec. 19, 1997); Stevens v. State, 691 N.E.2d 412 (Ind. 1997); Ben-Yisrayl v. State, 690 N.E.2d 1141 (Ind. 1997); Roche v. State, 690 N.E.2d 1115 (Ind. 1997); Doe v. Methodist Hosp., 690 N.E.2d 681 (Ind. 1997); Wrinkles v. State, 690 N.E.2d 1156 (Ind. 1997).

A REVIEW OF 1997 SEVENTH CIRCUIT BANKRUPTCY DECISIONS

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INTRODUCTION

The Seventh Circuit Court of Appeals rendered a number of interesting and important decisions in 1997, addressing a variety of bankruptcy issues. While some questions were left unresolved, the court did make some significant, if not always well-founded, decisions.

I. COURT RESOLVES FIFTY-DOLLAR DISPUTE

*In re Heath*¹ involved an unusual factual scenario: a bankruptcy trustee pursued an adversary proceeding through three courts in an attempt to recover \$50.00 for the debtor.² The court questioned the trustee's motivation, but it also noted that the Bankruptcy Code requires no minimum amount in controversy and that this case involved important legal questions.³ Heath filed for bankruptcy under Chapter 13, and the bankruptcy court confirmed a plan by which Heath would pay her creditors their allowed claims over five years at the rate of \$32.00 per week. The judge's order confirming the plan stated that Heath's income and other assets would "remain estate property to the extent necessary to fulfill the plan."⁴

When the debtor changed jobs a year later, a new garnishment order was issued. Heath's new employer, the U.S. Postal Service, charged her a one-time \$50.00 garnishment fee. The fee did not directly affect payments to creditors, but it did reduce the debtor's income. The trustee sued for the return of the \$50.00, which the trustee would have returned directly to the debtor, not to the estate, if he had prevailed. The bankruptcy court ruled in the trustee's favor, but the district court reversed, concluding that the trustee had no standing to bring the claim.⁵

The Seventh Circuit Court of Appeals affirmed the district court's decision, noting that the bankruptcy trustee holds, with some exceptions, the right to sue on behalf of the debtor's estate.⁶ While it is theoretically possible that a plan for repayment of creditors could retain in the debtor's estate all of the debtor's

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1. 115 F.3d 521 (7th Cir. 1997).
2. *Id.* at 522.
3. *Id.*
4. *Id.* at 522-23.
5. *Id.* at 523.
6. *Id.*

income during the pendency of the plan,⁷ the burden on the bankruptcy court would be immense, and in any event, that was not the case with this debtor. The plan in Heath's case placed only so much of her income and other property in the estate as was necessary to fulfill the plan, and there was "no effort to establish that Heath's financial situation was so fragile that the loss of \$50 will jeopardize fulfillment of the plan"⁸

The court added that although the Bankruptcy Code states that all of a Chapter 13 debtor's earnings are estate property,⁹ it also states that "confirmation of a plan vests all of the property of the estate in the debtor."¹⁰ The court concluded that, read together, the two code sections indicate "that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan."¹¹ The court's reasoning here is sound. The \$50.00 garnishment fee was not estate property. Furthermore, no other basis of core jurisdiction existed, and no evidence was presented to suggest that the action was "related" to the bankruptcy proceeding under 28 U.S.C. § 1334(b). The district court's decision was correctly affirmed.

II. CHAPTER 13: VALUING SECURED CLAIMS

*In re Hoskins*¹² involved a 1990 Ford Tempo owned by the Chapter 13 debtor and upon which NBD Bank held a lien. In the proposed plan, the bankruptcy trustee valued the bank's secured claim at \$3,987.50, half way between the stipulated retail and wholesale values of the car. The bankruptcy court approved the plan, the district court affirmed, and the bank appealed, arguing that the retail value was the correct measurement.

The Seventh Circuit Court of Appeals had not previously established a standard for valuing secured claims in Chapter 13 bankruptcies. Other courts of appeals are split on the issue, with one (the Fifth Circuit) using the wholesale value and most others using the retail value.¹³ Judge Posner concluded that a third alternative provided the most appropriate standard: the midpoint of the two values.

Under section 506(a) of the Bankruptcy Code, the value of the secured creditor's claim is defined in terms of the estate's interest in the property and "in light of the purpose of the valuation and of the proposed disposition or use of

7. "One can imagine a person so incompetent (in the practical, not legal, sense) in the management of his or her money that the only way in which the creditors would be paid would be if someone controlled all the debtor's expenditures." *Id.* at 524.

8. *Id.*

9. 11 U.S.C. § 1306(a)(2) (1994).

10. *Id.* § 1327(b).

11. *Heath*, 115 F.3d at 524.

12. 102 F.3d 311 (7th Cir. 1996).

13. *Id.* at 313.

such property”¹⁴ The majority opinion emphasized the word “use” in this definition, commenting on the Ninth Circuit Court of Appeals’ interpretation of that word¹⁵ and noting: “The significance of the statute’s reference to different possible uses of retained collateral is that it invites judicial attention to an economic problem [of bilateral monopoly] that may well be acute in cases in which the collateral is essential to the debtor’s livelihood.”¹⁶

Bilateral monopoly, a situation where two parties have only each other with whom to bargain over something, (i.e., they cannot rely on competition to influence the price),¹⁷ can be illustrated by a straightforward two-person lawsuit for damages or by the interaction between a secured creditor and a defaulting debtor (absent Chapter 13). As Judge Posner logically explained, if there were no bankruptcy proceeding, the bank could have seized the car upon Hoskins’ default. In theory, the bank would have then sold the car for the wholesale value (banks are not car retailers), and Hoskins would have had to purchase a comparable car at a higher retail price.¹⁸ If the two parties were negotiating, both would be better off at any value between the two extremes (wholesale and retail): the debtor would be permitted to keep the car for an obligation that was less than the retail purchase price of a different comparable vehicle, and the creditor would receive value at some level above the wholesale price it could have received had it seized and sold the car.¹⁹ The midpoint is a logical and natural gravitation point, as Judge Posner noted.²⁰

Application of this theory makes sense and leads to a just result. As the example in Judge Easterbrook’s concurring opinion (concurring “only because the Trustee, representing the interests of the unsecured creditors, has not taken cross-appeal”)²¹ illustrates,²² the secured creditor would receive a windfall if retail value were the measure, and the unsecured creditors would receive a windfall if wholesale value were the standard.²³ This new approach comes closer to preserving the positions the creditors held before the bankruptcy.²⁴ In any event, Seventh Circuit practitioners now have a clear standard for valuing secured claims involving automobiles and similar income-producing assets in Chapter 13 cases.²⁵

14. 11 U.S.C. § 506(a) (1994).

15. The word “use” suggests retail value in the situation where the debtor will use the property. Wholesale value is the value realized when the property is not used, but instead is sold. *Hoskins*, 102 F.3d at 315 (citing *In re Taffi*, 96 F.3d 1190, 1192 (9th Cir. 1996)).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 316.

20. *Id.*

21. *Id.* at 317.

22. *Id.* at 319.

23. *Id.* at 317.

24. See *Butner v. United States*, 440 U.S. 48, 55-56 (1979).

25. *Hoskins*, 102 F.3d at 316.

III. ATTORNEY FEES "PURSUANT TO CONTRACT"

As a general rule in the United States, a prevailing party in federal litigation collects a reasonable attorney's fee from the non-prevailing party only when authorized by federal statute or pursuant to an enforceable contract between the parties.²⁶ This rule applies to bankruptcy litigation, as well.²⁷ In *In re Sheridan*,²⁸ a creditor bank argued that Sheridan's debt to the bank should not be discharged. The bankruptcy court disagreed, and the district court affirmed that decision. Sheridan subsequently sought to recover over \$266,000 in attorney's fees and other costs incurred in defending the bank's discharge action. The bankruptcy court denied the debtor's request, and again the district court affirmed.

Because no statutory authority provided for the award of attorney's fees in this case, Sheridan relied on the contracts underlying his debt to the bank to support his position. Those contracts entitled the bank to recover reasonable attorney's fees and costs, and under Florida law, which governed the contracts, Sheridan arguably was entitled to a reciprocal benefit.²⁹ The court concluded that no basis existed for incorporating the Florida reciprocity statute, and it affirmed the district and bankruptcy courts' decisions not to award attorney's fees to Sheridan.³⁰

Analyzing the meaning of a Florida contract statute is beyond the scope of this article,³¹ but it should be noted that the Seventh Circuit's reasoning in affirming the district court's decision was less than convincing. The court stated that if a creditor is contractually entitled to attorney's fees and if the contract is enforceable under applicable state law, the court may enforce the contractual provision in a dischargeability action.³² Thus, if the bank had shown "that the underlying debt was non-dischargeable, it would have been entitled to recover its attorney's fees *pursuant to the contracts*."³³

The court placed great weight on the fact that in *In re Mayer* the attorney's fees provided for in the contract became part of the debt.³⁴ As the dissent pointed

26. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

27. *In re Reid*, 854 F.2d 156, 161-62 (7th Cir. 1988).

28. 105 F.3d 1164 (7th Cir. 1997).

29. "If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action . . . with respect to the contract." *Id.* at 1166 (quoting FLA. STAT. ch. 57.105(2)).

30. *Id.* at 1167.

31. See *id.* at 1167 n.1 (discussing the difficulty Florida bankruptcy courts have had in interpreting this statute in similar situations).

32. *Id.* at 1166 (citing *In re Mayer*, 51 F.3d 670, 677 (7th Cir.), cert. denied, 516 U.S. 1008 (1995)).

33. *Id.* (emphasis added).

34. *Id.* at 1166-67.

out, the situation where the debtor is collecting the fees is not nearly so neat.³⁵ However, this fact alone does not suffice to support the majority's conclusion that "this federal action does not qualify as one 'with respect to the contract' under the Florida statute."³⁶ It is illogical to assert several paragraphs earlier that the bank could recover the fees "pursuant to the contracts" and later baldly to conclude that this action is not one "with respect to the contract." The contracts either applied, or they did not.

Whether the result would be correct under the Florida statute is not clear. But this is not a well-reasoned opinion, and it does little to assist Seventh Circuit practitioners with the more general question regarding the applicability of a contractual provision for the payment of attorney's fees in a dischargeability action.

IV. RESERVING A CAUSE OF ACTION IN A REORGANIZATION PLAN

The holder of a secured note raised the debtor's interest rate and subsequently accelerated the loan, resulting in the debtor's filing of a bad faith breach of contract action and its subsequent filing for Chapter 11 bankruptcy protection. The contract action was removed to the bankruptcy court, and after a hearing, the court denied the debtor's requested relief. Later, the bankruptcy court approved a plan that included the following provision: "From and after the Effective Date [of the plan], the Disbursing Agent, on behalf of the Debtor and the Estate, shall enforce all causes of action existing in favor of the Debtor and the Debtor in Possession."³⁷

The bankruptcy court then granted the debtor's (D & K's) motion, whereby the disbursing agent abandoned the breach of contract cause of action.³⁸ D & K re-asserted the contract claim in state court, and it was removed to federal district court based on diversity. The district court dismissed the complaint on *res judicata* grounds, and D & K appealed.

The court of appeals noted that "the disbursing agent had no claim for breach of contract that was not barred by *res judicata*," so D & K could receive no such claim under the abandonment order.³⁹ Moreover, another basis for a *res judicata* bar arose when D & K failed to object to the claim of Mutual Life Insurance Company of New York (the creditor) in the bankruptcy proceeding.⁴⁰ Despite these independent bases for affirming the district court's decision, the Seventh

35. *Id.* at 1169.

36. *Id.* at 1167.

37. D & K Properties Crystal Lake v. Mutual Life Ins. Co., 112 F.3d 257, 259 (7th Cir. 1997).

38. "[T]o the extent the Breach of Contract Action may be deemed a cause of action within the purview of Section 7.1 of the Plan, . . . [the disbursing agent] prays for the entry of an order authorizing it to abandon same." *Id.*

39. *Id.* at 262.

40. *Id.* at 262 n.4.

Circuit explored in some detail the issue of reserving a cause of action.⁴¹

The court concluded that D & K's "reservation" was not sufficient to take the claim outside the *res judicata* bar. "To avoid *res judicata* the reservation of a cause of action must be both express, as in writing, and express, as in specifically identified."⁴² Although the opinion was muddled somewhat by a paragraph or two of vague and confusing language, the standard provided by the court is clear: the reservation of a cause of action not only must be in writing but also must identify the claim sought to be reserved.⁴³ If these criteria are met, the parties may then negotiate over the language, and they are "thereafter on notice about which claims [are] reserved and which claims [are] not."⁴⁴

V. THE NEW VALUE COROLLARY TO THE ABSOLUTE PRIORITY RULE

In order for a reorganization plan to be confirmed, the plan must satisfy the requirements of 11 U.S.C. § 1129. These requirements include, with respect to each class of claims or interests, that each such class accept the plan or that the class not be impaired under the plan.⁴⁵ If all the requirements of subsection (a) are met except paragraph (8), "the court . . . shall confirm the plan . . . if the plan does not discriminate unfairly, and is fair and equitable . . ."⁴⁶ It is within this context that the absolute priority rule comes into play.⁴⁷

"The general rule for a reorganization plan that has not been approved unanimously by the impaired classes is that it must meet the strictures of the absolute priority rule to be approved."⁴⁸ Before the Bankruptcy Code was passed, there existed a corollary to the absolute priority rule, called the "new value" corollary.⁴⁹ The corollary provided that if a junior interest holder contributed substantial new capital (in the form of money or money's worth) to the enterprise, that was necessary for the reorganization to succeed and that was reasonably equivalent to the value retained, the junior interest holder could retain

41. In analyzing this issue, the court relied extensively on an unpublished opinion from the Sixth Circuit, *Micro-Time Management Sys., Inc. v. Allard & Fish, P.C.*, 983 F.2d 1067 (Table) (6th Cir.), *cert. denied*, 510 U.S. 906 (1993). The court noted, tongue in cheek, that the Sixth Circuit places "no limitation on citation to unpublished opinions by courts." *D & K Properties*, 112 F.3d at 260 n. 2.

42. *D & K Properties*, 112 F.3d at 261.

43. *Id.*

44. *Id.*

45. 11 U.S.C. § 1129(a)(8) (1994).

46. *Id.* § 1129(b)(1).

47. The absolute priority rule is codified at 11 U.S.C. § 1129(b)(2)(B)(ii) (1994). A class of unsecured creditors that does not approve of the plan "must be provided for in full before any junior classes can receive or retain any property under the plan." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 197 (1988).

48. *In re 203 N. LaSalle Street Partnership*, 126 F.3d 955, 962-63 (7th Cir. 1997).

49. *Id.*

his or her equity interest over the impaired senior creditor class' objection.⁵⁰

When Congress codified the absolute priority rule, it did not codify the new value corollary. The issue the Seventh Circuit resolved, affirmatively, in *In re 203 N. LaSalle Street Partnership* was whether the new value corollary (also called the new value exception) survived the passage of the Bankruptcy Code.⁵¹

In *LaSalle Street* the debtor owed Bank of America more than \$93 million, which was secured by a mortgage on a piece of property. When LaSalle filed for bankruptcy under Chapter 11, the value of the property was approximately \$54.5 million, leaving the bank with a deficiency of approximately \$38.5 million. The reorganization plan provided that LaSalle's partners would contribute new capital, which the bankruptcy court concluded had a present value exceeding \$4 million. Both the bankruptcy court and the district court concluded that the corollary did survive the passage of the Code and that LaSalle's plan did not violate the absolute priority rule because it met the requirements of the corollary.

The court of appeals first decided that the absolute priority rule was ambiguous and thus that the court would have to look beyond the language of the statute itself.⁵² The court gave great weight to the Supreme Court's statement suggesting its reluctance judicially to effect significant changes to a pre-Code practice that was not at least the subject of discussion in the legislative history of the statute.⁵³ Accordingly, the court of appeals concluded that the "on account of" language in the absolute priority rule permitted "the continued existence of the new value corollary."⁵⁴

This conclusion, however, was met with a reasonably sound dissent. Judge Kanne placed his argument on a "plain language" hook.⁵⁵ The plain language of the absolute priority rule does not include a new value exception, and thus none exists. The argument continued: "One cannot contest the fact that the partners' new capital contributions are one reason why they are able to maintain their ownership of the indebted property. LaSalle's partners, however, receive this *exclusive* ownership right *only* 'on account of' their unique status as prior equity holders."⁵⁶ If the former owners earned their new interests at an open auction, it would not be "on account of" their prior interests but because of their capital contributions.⁵⁷ The majority opinion, in essence, inserts the words "solely" or "primarily" before the words "on account of."

However, as the dissent moved to a discussion of pre-Code practices, it lost

50. *In re Woodbrook Assocs.*, 19 F.3d 312, 319-20 (7th Cir. 1994).

51. The Seventh Circuit considered this issue on other occasions without resolving it. *LaSalle Street*, 126 F.3d at 963 n.7.

52. *Id.* at 964-65; *see also id.* at 964 n.8.

53. *Id.* at 965 (citing *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992)).

54. *Id.*

55. "Because the straightforward text of the statutory absolute priority rule prohibits such a Plan where there are dissenting, unsecured creditors, I see no need to look beyond the words of the statute." *Id.* at 973 (Kanne, J., dissenting).

56. *Id.* at 971 (Kanne, J., dissenting).

57. *Id.* at 972 (Kanne, J., dissenting).

some of its vigor and did not hold up well against the majority position. In any event, practitioners now have a clear answer to the new value corollary question. At least until the issue reaches the Supreme Court, the new value corollary survives in the Seventh Circuit.

VI. COMMENTS: OTHER INTERESTING DECISIONS

A. *In re USA Diversified Products, Inc.*⁵⁸

Paul Davis retained a Florida law firm to represent him, his wife, and his company in a fraud action. A few months later Davis wired \$125,000 from the company's money-market account to the law firm to fund a settlement that was being negotiated. The following day the company filed for bankruptcy under Chapter 11. Four days later Davis informed the law firm about the bankruptcy filing, but he said that the money came from his personal funds. Approximately two months passed, and Davis instructed the law firm to return the money to him, which the firm did after deducting \$14,000 in fees.

The Chapter 11 proceeding was subsequently converted into a Chapter 7 bankruptcy, and the trustee brought this action pursuant to 11 U.S.C. § 542(a) to recover the \$125,000 from the law firm.⁵⁹ Both the bankruptcy and district courts ruled in the trustee's favor. The court of appeals affirmed.

The court stated that it was unable to find a case to support its position but that Congress could not have intended a literal reading of 11 U.S.C. § 542(c) because of the potentially absurd results.⁶⁰ Instead, the court held that "the relevant knowledge or notice is knowledge or notice to a possessor of property that a bankruptcy proceeding had begun *and* that the property in the possessor's custody was property of a debtor in that bankruptcy proceeding."⁶¹ The law firm here knew that Diversified was in bankruptcy and knew enough to inquire further as to whom the \$125,000 belonged.

B. *In re Milwaukee Cheese Wisconsin, Inc.*⁶²

Milwaukee Cheese set up a "thrift savings plan" for its employees, their friends, and their relatives. When the company found itself in financial trouble, much of the money was withdrawn, and within 90 days the firm faced involuntary bankruptcy. The trustee sought to recover the "withdrawals" as

58. 100 F.3d 53 (7th Cir. 1996).

59. A person possessing or controlling property that belongs to the debtor's estate "shall deliver to the trustee, and account for, such property or the value of such property . . ." 11 U.S.C. § 542(a) (1994). The bankruptcy code further provides, however, that "an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate . . . as if the case under this title concerning the debtor had not been commenced." *Id.* § 542(c).

60. *See USA Diversified*, 100 F.3d at 56-57.

61. *Id.* at 57 (emphasis added).

62. 112 F.3d 845 (7th Cir. 1997).

preferential transfers, and after ten years of delays, the district agreed, finding that the transfers were preferences avoidable under 11 U.S.C. § 547(b). Despite the fact that some individuals would be especially hard hit by the requirement to return funds (one family would owe nearly \$130,000 plus ten years' interest), the court of appeals affirmed. Other innocent creditors also have claims that should not be diminished simply because a judge sympathizes with "a group of unfortunates. Judges are not entitled, in or out of bankruptcy, to favor the litigants they think most worthy, as opposed to those who have the best legal position."⁶³

C. *In re Lopez*⁶⁴

The Seventh Circuit reiterated its position regarding the situation where, following an appeal to the district court, the action is remanded for further proceedings in the bankruptcy court. Even if the bankruptcy court's decision was final, the district court's decision is not final and therefore is not appealable "unless the further proceedings contemplated are . . . purely ministerial"⁶⁵ The appellate courts are split on the issue, but this circuit's position is clear.⁶⁶

D. *Koopmans v. Farm Credit Services of Mid-America, ACA*⁶⁷

Here, the creditor was oversecured and under 11 U.S.C. § 506(b) was entitled to interest in the bankruptcy. The court had to decide what rate of interest would provide the "indubitable equivalence" of Farm Credit Services' property interest.⁶⁸ The bankruptcy court used a "prime-plus" method of approximating the market rate of interest, and the district court affirmed. The court of appeals agreed that this rate was appropriate. Though there is more than one method by which the market rate may be approximated, "the creditor is entitled to the rate of interest it could have obtained had it foreclosed and reinvested the proceeds in loans of equivalent duration and risk."⁶⁹

E. *In re Volpert*⁷⁰

Finally, the court was presented with an opportunity to resolve the issue of whether a bankruptcy court has the power to sanction under 28 U.S.C. § 1927.⁷¹ In *Volpert* the bankruptcy court explicitly relied on this statute in fining an

63. *Id.* at 848.

64. 116 F.3d 1191 (7th Cir. 1997).

65. *Id.* at 1192.

66. For those interested in this subject, the court includes a survey of other appellate court opinions on this topic. *Id.*

67. 102 F.3d 874 (7th Cir. 1996).

68. *Id.* at 874 (citing *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935)).

69. *Id.* at 875.

70. 110 F.3d 494 (7th Cir. 1997).

71. 28 U.S.C. § 1927 (1994).

attorney \$1,000 for conduct that “unreasonably and vexatiously multiplied the bankruptcy court’s proceedings.”⁷² The district court affirmed. After extensive discussion of the relevant issues, the court of appeals chose to leave the issue unresolved: “Given that we have determined . . . that the bankruptcy court in this case had ample authority, apart from § 1927, to sanction Mr. Ellis’ behavior, we shall travel the more prudent course and leave unanswered whether bankruptcy judges can exercise the authority of a ‘court of the United States.’”⁷³ Perhaps the next volume of the *Indiana Law Review* will include in its survey a decision resolving this question.

72. *In re Volpert*, 110 F.3d at 496.

73. *Id.* at 500.

1997 FEDERAL CIVIL PRACTICE UPDATE FOR SEVENTH CIRCUIT PRACTITIONERS

JOHN R. MALEY*

Federal practitioners in the Seventh Circuit faced another year of procedural developments in civil practice. This Article outlines key developments. For ease of future reference, topics are listed in the order in which they often arise in litigation.

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I. SUBJECT-MATTER JURISDICTION

A. Federal Jurisdiction

In *Blackburn v. Sundstrand Corp.*,¹ plaintiffs were injured in an auto accident and settled with the driver. The plaintiffs' employer, through its welfare benefit plan (covered by ERISA), had paid \$25,000 toward the cost of plaintiffs' medical care, and thus had a subrogation right against the recovery. Plaintiffs then filed a state-court action asking that a portion of their fees and expenses be charged against the employer's subrogation right. The employer removed the action under 28 U.S.C. § 1441(b),² which allows removal of federal-question cases. The district court heard the case and entered judgment against the plaintiffs.³

On appeal, the Seventh Circuit determined that the district court lacked subject-matter jurisdiction.⁴ Judge Easterbrook explained, "[n]ot even the most

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1. 115 F.3d 493 (7th Cir.), *cert. denied*, 118 S. Ct. 562 (1997).
2. 28 U.S.C. § 1441(b) (1994).
3. *Blackburn v. Becker*, 933 F. Supp. 724 (N.D. Ill. 1996).
4. *Blackburn*, 115 F.3d at 494.

expansive reading of ERISA covers motor vehicle collisions, just because part of the recovery may inure to the benefit of a plan.⁵ Federal preemption, the court explained, does not create federal jurisdiction.⁶ (The only exception is so-called “complete preemption,” which arises when plaintiff’s claim does depend on federal law, but plaintiff attempts to craft a state claim through artful pleading.)⁷

B. Amount-In-Controversy

Judge Miller’s decision in *TLS Industrial v. King Lift*,⁸ shows the ongoing problems with determining the amount in controversy in removed diversity actions where there is no specific dollar prayer. In *King Lift*, plaintiff agreed to purchase twenty trucks from the seller-defendant. Plaintiff initially ordered four trucks, but claimed they were not timely delivered and were defective. Plaintiff then repudiated the contract and sued the seller for breach of contract in state court; no specific dollar prayer was stated in the complaint.

The seller removed the action asserting diversity jurisdiction and an amount-in-controversy exceeding \$75,000. The buyer moved to remand, and submitted a post-removal affidavit asserting the amount-in-controversy was only \$60,000 (the costs of the four trucks). The seller asserted that the amount in controversy could be more than \$200,000 because up to twenty trucks were to be purchased.

Judge Miller followed Seventh Circuit precedent that post-removal affidavits by plaintiff do not reduce the amount in controversy, which is determined at the time of removal.⁹ However, Judge Miller remanded the action to state court, reasoning that the seller had not established that the lost profits on the twenty trucks would exceed \$15,000 (there being no dispute that at least \$60,000 was otherwise at issue).

King Lift shows that defendants seeking removal face challenges in establishing the requisite amount-in-controversy. Federal courts appear to be taking a hard line on this subject, and because specific dollar amounts cannot be requested in Indiana personal-injury actions under Indiana Trial Rule 8(A)(2), defendants will face this issue with regularity.

C. Limited Jurisdiction

In *Whitney v. Riccordino Realty, Inc.*,¹⁰ a *pro se* plaintiff tried (a third time) to bring a landlord-tenant action in federal court. In the course of affirming the district court’s *sua sponte* dismissal, the Seventh Circuit reiterated the district courts’ duty to police its limited jurisdiction and raise jurisdiction even when the

5. *Id.*

6. *Id.* at 495.

7. *Id.*

8. No. 3:97-CV-294RM (S.D. Ind. July 17, 1997).

9. *Chase v. Shop ‘N Serve Warehouse Foods, Inc.*, 110 F.3d 424, 429 (7th Cir. 1997).

10. 106 F.3d 404 (7th Cir. 1997).

parties do not.¹¹ For those challenging subject-matter jurisdiction, the opinion has excellent language and a litany of useful Seventh Circuit cites.

II. RULES CHANGES

A. *Federal Rules Changes*

Several rules changes took effect December 1, 1997. Highlights include:

- Federal Rules of Civil Procedure 74,¹² 75,¹³ 76¹⁴ will be deleted. Each of these rules addresses appeals from Magistrate Judges where, under pre-1996 practice, parties could consent to a Magistrate Judge with a right of appeal to the District Judge (rather than to the court of appeals). As part of the Federal Courts Improvement Act of 1996,¹⁵ the former provisions of 28 U.S.C. § 636(c)(4) and (5)¹⁶ that allowed this alternate appeal route were repealed. The current repeal of Rules 74, 75, and 76 simply puts the rules in compliance with the statute to avoid confusion.
- Federal Rule of Evidence 407¹⁷ will be amended as follows: When, after an *injury or harm allegedly caused by an event*, measures are taken ~~which that~~, if taken previously, would have made the *event injury or harm* less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, ~~or~~ culpable conduct, *a defect in a product, a defect in a product's design, or a need for a warning or instruction in connection with the event*.¹⁸

This amendment makes two changes. First, the addition of “an injury or harm allegedly caused by”¹⁹ is meant to clarify that the rule applies only to changes made after the occurrence that produced the damages at issue. Pre-accident remedial measures are not excluded pursuant to Rule 407.

Second, the amendment to the end of the Rule confirms that subsequent remedial measures may not be used to prove a defect in a product or its design, or that a warning or instruction was necessary. Most circuits had so ruled even prior to the amendment.²⁰

- Federal Rule of Evidence 803(24),²¹ the hearsay “catch-all” provision, is being relocated to new Rule 807.²² No change will occur to the language of former Rule 803(24).

11. *Id.*

12. FED. R. CIV. P. 74 (repealed 1997).

13. FED. R. CIV. P. 75 (repealed 1997).

14. FED. R. CIV. P. 76 (repealed 1997).

15. 18 U.S.C. § 3401(b) (Supp. I 1996); 28 U.S.C. § 636(a) (Supp. I 1996).

16. 28 U.S.C. § 636(c)(4)(5) (1994) (repealed 1996).

17. FED. R. EVID. 407.

18. FED. R. EVID. 407 (amended 1997).

19. *Id.*

20. *See, e.g., Flaminio v. Honda Motor Co.*, 733 F.2d 463, 469 (7th Cir. 1984).

21. FED. R. EVID. 803(24) (amended 1997).

22. FED. R. EVID. 807 (amended 1997).

B. Local Rule 6.1 of the Southern District of Indiana

For several years, Local Rule 6.1²³ has allowed parties to document an initial extension by a simple filing with the court rather than a motion and order. The Rule makes sense: there is no reason to burden parties and the court with an unnecessary motion when a simple letter of agreement to the court allows the clerk to monitor the case deadlines. However, the Rule has undergone several recent changes.

First, the Rule formerly required a "letter" to be filed with the clerk. This caused some problems in that the letter did not have a formal title—thus leaving the clerk to create one for docketing purposes (for example, Letter of Extension to Answer). More significantly, Rule 6.1 letters often did not include the parties or the cause number, thus forcing the clerk to determine in which case the letter should be filed.

By amendment, effective April 1, 1997, such agreement must now be memorialized by a "notice" to be filed with the court.²⁴ Such a notice, of course, will have a caption and cause number making processing easier for the clerk.

Second, the prior Rule stated that when opposing counsel does not consent to the extension, the clerk should not accept for filing any letter (now notice) that does not contain a recitation of the effort to obtain agreement. This "no-filing" provision of Local Rule 6.1 has been deleted to comply with Federal Rules of Civil Procedure 5(e), which prohibits the clerk from refusing to accept any filing because it is not in compliance with federal or local rules.²⁵ (The court can thereafter strike such a filing, but the clerk must accept defective filings).

C. Pilot Case Management Program Takes Effect In Southern District

Several judges of the Southern District of Indiana implemented a Pilot Case Management Program. Specifically, all new cases managed by Magistrate Judge Shields—which includes cases assigned to Chief Judge Barker and Judge McKinney—are subject to the new Pilot Program. The Pilot Program took effect September 1, 1997, and applies to all civil actions managed by Judge Shields that were filed through counsel on or after September 1. The highlights of the Pilot Program are as follows:

1. *Logistics Of The New Plan.*—Unlike existing procedures in which the sample case management plan and instructions are issued by the court after defendant appears, under the Pilot Program, the sample case management plan and instructions are given to the *plaintiff's counsel* at time of filing, and plaintiff's counsel then serves those documents on defendant with the summons and complaint. The case management plan is then due within 60 days of filing.

2. *Differential Case Management Tracks.*—A key component of the Pilot Program is the implementation of differential case management tracks with

23. S.D. IND. L.R. 6.1.

24. S.D. IND. L.R. 6.1 (amended 1997).

25. See FED. R. CIV. P. 5(e).

different schedules. Specifically, the Pilot Program allows for three different schedules: Track One (twelve months from filing to trial); Track Two (eighteen months from filing to trial); and Track Three (twenty-four months from filing to trial). Under the Pilot Program, all cases are presumptively Track One cases. To vary from Track One, the parties must set forth in writing in the case management plan why another Track should be used.

3. *Jury Instructions With Plan.*—Another new component of the Pilot Program is the requirement that parties attach proposed jury instructions on all claims and defenses. The purpose of this requirement is to require parties to know the elements and bases for their pleaded claims and defenses at the outset of the litigation.

As presently implemented, there is no discussion in the Pilot Program guidelines as to what occurs, if anything, if the instructions tendered with the case management plan vary from the instructions ultimately tendered prior to trial. However, the case management plan does require proposed jury instructions two weeks prior to trial, and it is this author's opinion that there probably will not be any preclusion or waiver ordered by these judges if there is a good faith effort in the case management plan to include appropriate jury instructions. Opposing counsel, however, are likely to raise such arguments, so care should be taken to include full and complete instructions with the case management plan.

4. *Summary Judgment Procedure.*—Perhaps the greatest change under the Pilot Program is in summary judgment practice. For cases under the Pilot Program, summary judgment packages (including motion, brief, appendix, opposition brief and materials, and reply) will be filed as a single package with the reply brief. These materials are not filed before that time, but are served on opposing counsel. This new filing procedure will make it easier for the court and clerk's office by reducing the number of filings.

All the summary judgment work must be done such that the entire package can be filed 120 days prior to trial. Under the Pilot Program guidelines, the motion for summary judgment and accompanying materials must be served on opposing counsel thirty-six days prior to the summary judgment deadline (that is, 156 days prior to trial).

Also, fifteen days prior to serving the summary judgment motion the parties must meet and then file a "Pre-Summary Judgment Statement" (thus making the Pre-Summary Judgment Statement due fifty-one days prior to the summary judgment deadline and 171 days prior to trial). The Pre-Summary Judgment Statement shall contain a joint statement of undisputed material facts and a statement from each party setting forth the disputed material facts, all with specific citations to record evidence.

The Pilot Program guidelines state in bold print that "[i]n no event will counsel's lack of cooperation in preparing the pre-summary judgment statement constitute cause to delay the service of the motion for summary judgment upon the opposing party." The guidelines add: "In the event that counsel is unable to secure the cooperation of opposing counsel in preparing the pre-summary judgment statement, a notice to the court setting forth the unsuccessful efforts that were made to prepare the joint statement shall be filed with the court on the

same day that the summary judgment motion is served on opposing counsel.”

The Pre-Summary Judgment Statement and its timing (189 days into the case) will require parties with possible summary judgment motions to complete their investigation and discovery rapidly. As a practical matter, the Pre-Summary Judgment Statement will need to be prepared by the moving party (typically the defendant) and sent to the non-movant well in advance of the deadline for filing the Statement. At a minimum, ten to fifteen days’ advance-notice probably should be given to opposing counsel so that opposing counsel cannot claim lack of time to participate in preparation of the Statement.

5. *Requests For Production Served With Complaint.*—To expedite the progress of cases, the Pilot Program requires plaintiff to serve its request for production of documents with the complaint. Although some counsel may not like this mandate, it is a common-sense way to get the case moving. At the time of drafting the complaint, there is no reason counsel cannot also draft initial document requests.

6. *Bifurcated Discovery.*—Another aspect of the Pilot Program is bifurcated discovery whereby liability discovery is to be completed prior to the summary judgment process, and all other discovery (e.g., damages) remains open until thirty days prior to trial. The guidelines further provide, “We emphasize that the court will not condone inattention to discovery which has the effect of benefitting the opponent of a motion for summary judgment.” The guidelines then state, “In other words, a party should not lay back and wait for the proponent’s road map to be set out in a summary judgment motion and then expect to do discovery to affect a detour.”

7. *Trial Continuances.*—Finally, the Pilot Program requires parties, in addition to counsel, sign any motion for continuance of trial. The purpose of this requirement (which has been adopted by several other districts) is to ensure that clients do not lose their prompt trial setting without their consent.

III. JURY DEMANDS

In *Keystone Aviation v. Raytheon Aircraft*,²⁶ plaintiff sued alleging improper servicing of an aircraft. Plaintiff did not initially make a jury demand within the ten day post-pleadings limitation of Federal Rule of Civil Procedure 38(b),²⁷ but made an untimely jury demand sixty-seven days after the answer. Defendant moved to strike the demand, acknowledging the court’s discretion but arguing that no good reason had been shown for the delay and that a jury trial would be more expensive and, given the technical issues, possibly problematic for a jury.

Chief Judge Barker granted the motion to strike, reasoning primarily that no reason existed for the delay in demanding a jury. Those seeking jury trials are thus advised to include that request in their complaint or answer to avoid inadvertently missing the Rule 38 deadline.

26. IP96-1330 (S.D. Ind. Jan. 22, 1997).

27. FED. R. CIV. P. 38(b).

IV. FICTITIOUS PARTIES: “JOHN DOE” PARTIES

In *Doe v. Blue Cross & Blue Shield United*,²⁸ plaintiff filed his action under a fictitious name fearing that litigation might result in disclosure of his psychiatric records. Plaintiff initiated the lawsuit with an unopposed motion to proceed under the fictitious name, which the district court granted without comment.

In the course of addressing plaintiff’s appeal on the merits, Chief Judge Posner noted the fictitious name filing.²⁹ Judge Posner observed that the “judge’s action was entirely understandable given the absence of objection and the sensitivity of psychiatric records, but we would be remiss if we failed to point out that the privilege of suing or defending under a fictitious name should not be granted automatically even if the opposing party does not object.”³⁰ He added, “[t]he use of fictitious names is disfavored, and the judge has an independent duty to determine whether exceptional circumstances justify such a departure from the normal method of proceeding in federal courts.”³¹ Indeed, as Judge Posner noted, Rule 10(a) provides that the complaint shall give the name of all parties.³² This stems from the people’s “right to know who is using their courts.”³³

Although there are exceptions when public records are sealed for good reasons (such as state secrets, trade secrets, informers, rape victims, etc.), it is not enough that the case involves a medical issue.³⁴ And, Judge Posner added, “[s]hould ‘John Doe’s’ psychiatric records contain material that would be highly embarrassing to the average person yet somehow pertinent to this suit and so an appropriate part of the judicial record, the judge could require that this material be placed under seal.”³⁵

This decision is the most recent in a line of cases in which the Seventh Circuit has taken a hostile view towards unnecessary confidentiality. To proceed under a fictitious name or place records under seal, there must be good cause—not merely agreement of the parties.

V. CLASS ACTIONS

Class actions are not always a panacea for class members. In *In re Brand Name Prescription Drugs Antitrust Litigation*,³⁶ several class members were dissatisfied with a district court ruling (made final and appealable under Rule 54(b)). These dissatisfied class members—who were not the named plaintiffs

28. 112 F.3d 869 (7th Cir. 1997).

29. *Id.* at 872.

30. *Id.*

31. *Id.*

32. FED. R. CIV. P. 10(a).

33. *Doe*, 112 F.3d at 872.

34. *Id.*

35. *Id.*

36. 115 F.3d 456 (7th Cir. 1997).

serving as class representatives—sought to appeal. The Seventh Circuit held that class members who are not named parties have no rights to appeal.³⁷ Chief Judge Posner explained,

[i]f the certified class representative does not adequately represent the interests of some of the class members, those class members can opt out of the class action, can seek the creation of a separately represented subclass, can ask for the replacement of the class representative, or can intervene of right and become named plaintiffs themselves, or even class representatives, represented by their own lawyer.³⁸

VI. DISCOVERY

A. Discovery Disputes

In *Doe v. Howe Military School*,³⁹ Judge Miller addressed a dispute over the location, duration, and logistics of document production. After making numerous documents available for inspection at its place of business, defendant became dissatisfied with the length of time it was taking plaintiffs to inspect documents there, and suddenly insisted that documents be inspected at defense counsel's office.⁴⁰

Judge Miller granted a protective order requiring production to continue as originally scheduled, finding that defendant did not show a valid basis for changing the original plan. Judge Miller also ordered defendant pay plaintiffs' fees in bringing the Rule 37 motion.⁴¹

B. Discovery In Products Cases

In *Piacenti v. General Motors Corp.*,⁴² the court denied plaintiff's motion to compel General Motors to produce information regarding product models beyond the subject vehicle. The case is an important read for product-liability attorneys.

C. Ex Parte Communications With Former Employees: Rule of Professional Conduct 4.2

In *Wesleyan Pension Fund, Inc. v. First Albany Corp.*,⁴³ Chief Judge Barker affirmed Magistrate Judge Shields' order allowing ex parte interviews of former officers and board members of the opposing party. Judge Shields has so interpreted Rule 4.2 of the Indiana Rules of Professional Conduct on several

37. *Id.* at 457.

38. *Id.* at 457-58.

39. No. 3:95-CV-206 RM, 1996 WL 663164 (N.D. Ind. July 23, 1996).

40. *Id.* at *2.

41. *Id.* at *5.

42. 173 F.R.D. 221 (N.D. Ill. 1997).

43. 964 F. Supp. 1255 (S.D. Ind. 1997).

occasions in unpublished orders: Judge Endsley issued a similar unpublished ruling before his retirement, and the Northern District of Indiana has issued several similar rulings as well.

Separately, *Wesleyan Pension Fund* is good reading for the deferential standards that apply to a district judge's review of a magistrate judge's order on a nondispositive matter. Pursuant to Federal Rule of Civil Procedure 72(a), reversal is appropriate only if the order is "clearly erroneous or contrary to law."⁴⁴ Counsel ordinarily should not have high hopes of reversing a magistrate judge's discovery ruling, particularly one involving fact-finding and/or discretion.

VII. EXPERTS

A. Daubert Applies To Social Scientists

For some time after the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴⁵ there was considerable debate regarding the application of the decision to non-technical experts such as social scientists. In recent years, case law has answered this affirmatively. For instance, in his decision addressing the Indiana "notice and waiting period" abortion statute, Judge Hamilton noted that in the last two years, the Seventh Circuit has applied the *Daubert* standards to social scientists in several cases.⁴⁶ Parties offering or resisting social scientists should focus on *Daubert* accordingly.

B. Daubert and Appellate Standard Of Review

In *General Electric Co. v. Joiner*,⁴⁷ the Supreme Court held that the appellate standard of review on *Daubert* admissibility questions is abuse of discretion.⁴⁸ The district court had excluded expert testimony, but the Eleventh Circuit reversed, applying a stringent standard of review.⁴⁹ The Supreme Court again reversed, holding that the district court did not abuse its discretion.⁵⁰ *Joiner* confirms that the real *Daubert* battle is won or lost in the district court, not on appeal.

44. FED. R. CIV. P. 72(a).

45. 509 U.S. 579 (1993).

46. See *A Woman's Choice-East Side Women's Clinic v. Newman*, 906 F. Supp. 962 n.6 (S.D. Ind. 1997) (citing *People Who Care v. Rockford Bd. of Education*, 111 F.3d 528, 527-28 (7th Cir. 1997) (statistical study inadmissible under *Daubert*)); *Sheehan v. Daily Racing Form*, 104 F.3d 940, 942 (7th Cir. 1997); *Tyus v. Urban Search Management*, 102 F.3d 256, 263-64 (7th Cir. 1996) (district court erred in excluding expert testimony on effectiveness of advertising); *United States v. Hall*, 93 F.3d 256, 263-64 (7th Cir. 1996) (district court erred in excluding psychologist's and psychiatrist's testimony concerning false confession).

47. 118 S. Ct. 512 (1997).

48. *Id.* at 515.

49. *Id.* at 516.

50. *Id.* at 515.

C. Expert Reports In Federal Court: Rule 26(a)(2) Revisited

As part of the sweeping amendments to the Federal Rules in December 1993, Rule 26(a)(2)⁵¹ was added requiring preparation and disclosure of detailed expert reports for “a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony . . .”⁵² Attorneys and the courts have now had three years to interpret and apply this Rule. The results are clear: Rule 26(a)(2) is having a dramatic impact on expert practice in federal courts. This section of the Article outlines key developments and lessons from Rule 26(a)(2) jurisprudence.

1. What Is Required.—Rule 26(a)(2) requires a written report “prepared and signed by the witness.”⁵³ There is no reason to conclude that counsel are precluded from assisting in preparation of the report, but the expert must be able to honestly say that they prepared the report and that it contains their findings and opinions. As the official comments note, “Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed.”⁵⁴ The comments add, “Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.”⁵⁵

The report shall contain:

- a complete statement of all opinions to be expressed and the basis and reasons therefor;
- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the study and testimony; and
- a listing of any other cases in which the witness has testified as an expert at trial or deposition within the preceding four years.⁵⁶

2. What About Treating Physicians?—Expert reports are required by experts “retained or specially employed to provide expert testimony in the case . . .”⁵⁷ The comments provide, “[a] treating physician, for example, can be deposed or

51. FED. R. CIV. P. 26(a)(2).

52. *Id.*

53. *Id.*

54. FED. R. CIV. P. 26(a)(2) cmt.

55. *Id.*

56. *Id.*

57. FED. R. CIV. P. 26(a)(2)(A).

called to testify at trial without any requirement for a written report.”⁵⁸ There is authority supporting this position.⁵⁹

Defense lawyers, however, are apt to argue that when the treating healthcare provider goes beyond treatment and begins to testify more like a retained expert (in other words, doing more than providing treatment), such a witness should be required to provide a report as to non-treatment issues. There is authority supporting this proposition as well.⁶⁰

3. *There Is No Opt-Out.*—Unlike the initial mandatory disclosures of Rule 26(a)(1) which can be opted out of by local rules (as the Southern District of Indiana has done), there is no local rule opt-out for Rule 26(a)(2). The Rule itself states, “Except as otherwise stipulated or directed by the court . . . ”⁶¹ but does not reference a local rule opt-out.

Moreover, as a practical matter federal courts are not allowing parties to stipulate away the 26(a)(2) requirements. Indeed, in the Southern and Northern Districts of Indiana, case management plans are presumptively required (by the terms of the proposed case management plans) to include 26(a)(2) report deadlines.

4. *Deadlines.*—Rule 26(a)(2)(C) provides that in the “absence of other directions from the court or stipulation by the parties, the [expert] disclosures shall be made at least 90 days before the trial date . . . ”⁶² As a practical matter, in most cases ninety days before trial is too late in the game, so most case management plans in local federal courts set expert disclosures much earlier in the case.

If the evidence “is intended *solely* to contradict or rebut evidence on the same subject matter identified by another party [in its expert report, disclosure is due] within 30 days after the disclosure made by the other party.”⁶³ Caution is appropriate here, for as with purported rebuttal witnesses—who often are deemed by the courts to be “case-in-chief” witnesses and thus excluded—“rebuttal” expert reports may be deemed non-rebuttal, untimely, and thus excluded.

5. *Who Goes First.*—Rule 26(a)(2) does not directly address whether the plaintiff and the defendant are to disclose their reports simultaneously or whether plaintiff will disclose first followed by the defendant (except to the extent “rebuttal” reports are addressed above). The practice in most courts is for plaintiffs (or the party with the burden of proof) to disclose their reports first, with the opposing party to follow within thirty-ninety days thereafter. This is

58. *Id.*

59. See, e.g., *Salas v. United States*, 165 F.R.D. 31, 33 (W.D.N.Y. 1995); *Brown v. Best Foods*, 169 F.R.D. 385, 387 (N.D. Ala. 1996).

60. See *Widhalm v. Wal-Mart Stores, Inc.*, 162 D.R.D. 591 (D. Neb. 1995) (plaintiff failed to provide Rule 26(a)(2) report for treating physician, court precluded physician from providing expert testimony as to causation and disability rating (neither of which were part of the treating physician’s treatment)).

61. FED. R. CIV. P. 26(a)(2)(B).

62. FED. R. CIV. P. 26(a)(2)(C).

63. FED. R. CIV. P. 26(a)(2)(C) (emphasis added).

sound practice, for if a plaintiff contends that a product is defective and supports the claim with expert testimony, the defendant cannot effectively counter the expert unless the plaintiff's report is disclosed first.

This practice is supported by the comments to the Rule, which provide, "Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue."

6. *Depositions*.—Rule 26(b)(4) expressly allows depositions of testifying experts (using the term "may" depose), but not until "after the report is provided."⁶⁴ In practice, fewer experts are currently being deposed at all—particularly defense experts by plaintiffs—because Rule 26(a)(2) reports, if done correctly, provide substantial information to the opposing party. As the Eighth Circuit has noted, "[s]ince depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition."⁶⁵

7. *Supplementation*.—Pursuant to Rule 26(e), parties making disclosures under Rule 26(a) are "under a duty to supplement or correct the disclosure . . . to include information thereafter acquired"⁶⁶ if:

- "ordered by the court, or
- the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during [discovery] or in writing."⁶⁷

With respect to expert reports, Rule 26(e) further adds that the duty to supplement "extends both to the information contained in the report and to information provided through a deposition, . . . and any additions or other changes to this information shall be disclosed by the time the party's [trial] disclosures under Rule 26(a)(3) are due."⁶⁸

8. *Penalties for Non-Compliance*.—Rule 37(c)(1) provides: "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed."⁶⁹ In addition, the court may impose "other appropriate sanctions" in addition or in lieu of the above.⁷⁰

This rule is being taken seriously by federal judges—as it should be, given the mandatory "shall" language. For instance, in *1st Source Bank v. First*

64. FED. R. CIV. P. 26(b)(4).

65. *Sylla-Sawdon v. Uniroyal Goodrich Tire*, 47 F.3d 277, 284 (8th Cir. 1995).

66. FED. R. CIV. P. 26(e).

67. *Id.*

68. *Id.*

69. FED. R. CIV. P. 37(c)(1).

70. *Id.*

Resource Fed. Credit Union,⁷¹ the court precluded an economic expert from testifying as to pre-judgment interest issues where the report only generally stated that the expert would testify regarding pre-judgment interest.

Similarly, in *Walsh v. McCain Foods*,⁷² the Seventh Circuit found no error in a district court's decision to limit a defense expert's testimony to subjects addressed in his report and deposition. The court explained, "[Defendant] cannot legitimately argue that [the expert] should have been allowed to testify about matters not previously disclosed to the plaintiffs."⁷³

In *Carter v. Fenner*,⁷⁴ the district court precluded an expert from testifying where the expert's "report" consisted merely of one page of unsigned, untitled, handwritten notes lacking the date or other information considered by the "alleged author."

Finally, in *Indiana Insurance Co. v. Hussey Seating Co.*,⁷⁵ Chief Judge Barker addressed defendant's motion to exclude the plaintiff's damages expert for non-compliance with Rule 26(a)(2)(B). She explained that: (a) the report must be signed by the expert, (b) although the lawyer is entitled to assist, the report should be "written in a manner that reflected the testimony specifically to be given by [the expert] and embraced by him," and (c) the report must be complete.⁷⁶ She added, "Rule 26 requires an expert witness to disclose his or her opinions and the bases for those opinions in a single report."⁷⁷

Although Judge Barker found that plaintiff had failed to comply with Federal Rule of Civil Procedure 26(a)(2)(B), she was "reluctant to . . . exclude the testimony of the witness who appears to be Plaintiff's primary damages expert."⁷⁸ This was largely because the "[d]efendant has not contended that it was significantly prejudiced or that its defense was hampered by Plaintiff's violations."⁷⁹ However, Chief Judge Barker ordered the plaintiff to pay the defendant's attorneys' fees relating to the motion.⁸⁰

9. *Conclusion.*—Rule 26(a)(2) has changed expert practice in federal court. No longer can parties list several purported experts and force the opponent to either spend money deposing them or proceed with the risk that the expert will actually testify. Instead, reports are mandatory, and they must comply with the literal language of Rule 26(a)(2). Practitioners are well advised to take Rule 26(a)(2) seriously. Federal judges do, and now that Rule 26(a)(2) has been in place for three years, federal judges are less apt to be tolerant of non-compliance.

71. 167 F.R.D. 61 (N.D. Ind. 1996).

72. 81 F.3d 722 (7th Cir. 1996).

73. *Id.* at 727.

74. Nos. CIV.A. 92-3496, CIV.A. 92-3497, 1996 WL 592924 (E.D. La. 1996).

75. 176 F.R.D. 291 (S.D. Ind. 1997).

76. *Id.* at 292-93.

77. *Id.* at 295.

78. *Id.*

79. *Id.*

80. *Id.*

VIII. SUMMARY JUDGMENT

A. Motions To Strike/Summary Judgment

In *Powers v. Runyon*,⁸¹ Judge Tinder granted summary judgment for the employer in a *pro se* plaintiff's discrimination case. In so doing, Judge Tinder struck several of the plaintiff's exhibits opposing summary judgment due to lack of authentication. The court wrote:

[T]o be considered in support or opposing a motion for summary judgment, documents must be authenticated. Other materials are of no value in either establishing the presence or the absence of a material question of fact.

....

[F]or a document to be considered . . . [at] summary judgment, the document must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.⁸²

Plaintiff had submitted unsworn, unauthenticated written statements from several witnesses. Applying this standard from Rule 56(e), Judge Tinder struck those materials.⁸³ The employer also moved to strike certain materials based on relevance. The court denied this aspect of the motion to strike, explaining,

Although the issue of relevance is certainly one of the fundamental questions in sifting through expanded evidentiary material to determine whether the standard of Rule 56(c) has been met, the ordinary course this court follows is to determine whether and how those materials relate to the factual and legal issues which must be determined in ruling on the motion.⁸⁴

B. Summary Judgments In Discrimination Cases

The opinion in *Hunt-Golliday v. Metropolitan Water District of Greater Chicago*,⁸⁵ is an excellent primer for employment litigators. Beyond the substance of the opinion, it is noteworthy for highlighting that in 1996, the Seventh Circuit heard twenty-six appeals from summary judgments for employers in discrimination cases. Of those twenty-six appeals, twenty-one summary judgments were affirmed (slightly over eighty percent).⁸⁶

81. 974 F. Supp. 693 (S.D. Ind. 1997).

82. *Id.* at 696-97.

83. *Id.*

84. *Id.* at 697.

85. 104 F.3d 1004 (7th Cir. 1997).

86. *Id.*

IX. OFFERS OF JUDGMENT

In *Fisher v. Kelly*,⁸⁷ a defendant utilizing Rule 68 made an offer of judgment of \$7,500 plus costs accrued to date. Plaintiff accepted the offer in this § 1983⁸⁸ case and then awarded costs but denied plaintiff's attorneys fees under 42 U.S.C. § 1988. On appeal, the Seventh Circuit affirmed.⁸⁹

Although costs include fees for purposes of Rule 68 under § 1988, the fact that the case settled did not automatically make the plaintiff a prevailing party. Further, where a party settles a case merely for the nuisance value of the claim, district courts may find in their discretion that the plaintiff is not a prevailing party. In this case, defendant's offer of judgment specifically recited that it was made for nuisance value and denied liability. Accordingly, any defense counsel making an offer of judgments should be familiar with *Fisher* and utilize its creative approach.

X. SANCTIONS

In *Tye v. Kilroy Co.*,⁹⁰ Chief Judge Barker approved Magistrate Judge Hussman's recommendation for sanctions. The plaintiffs were seriously injured in the workplace in an accident involving a conveyor. Plaintiffs' counsel sued the Kilroy Company asserting a products liability claim. However, Kilroy had nothing to do with the design or manufacture of the conveyor. Prior to filing the claim, plaintiffs' counsel—who had fifteen months before the limitations period expired—did not investigate whether Kilroy had any role in the design or manufacture of the conveyor.

After initial discovery, plaintiffs' counsel advised his clients that he no longer thought a cause of action existed against Kilroy, and he requested permission to dismiss the action. The plaintiffs refused, so counsel withdrew. The action was later dismissed for failure to prosecute, and Kilroy moved for sanctions.⁹¹

In recommending that the motion be granted, Magistrate Judge Hussman found that counsel failed to make a reasonable inquiry into the facts before filing the action. This was aggravated by counsel's failure to further investigate the facts before filing an amended complaint as well. Chief Judge Barker accepted the recommendation and report and granted the motion for sanctions.⁹²

In *Cleveland Hair Clinic v. Puig*,⁹³ the Northern District of Illinois sanctioned the defendants and their counsel a total of \$174,121. The appeal involved technical procedural issues unrelated to sanctions, but the case is another reminder that Rule 11 is taken seriously in the Seventh Circuit,

87. 105 F.2d 350 (7th Cir. 1997).

88. 42 U.S.C. § 1983 (1994).

89. *Fisher*, 104 F.3d at 350.

90. No. NA 90-112-C B/F, 1996 WL 663708 (S.D. Ind. 1996).

91. *Id.*

92. *Id.*

93. 104 F.3d 123 (7th Cir. 1997).

particularly in the Northern District of Illinois.

In *Norwest Bank v. Kmart Corp.*,⁹⁴ Judge Miller wrote, "Ex parte conversations about the case with a law clerk are no more appropriate than direct ex parte conversations with the judge, and this court does not act on such communications."⁹⁵

In the same opinion, Judge Miller outlined several ways for counsel to streamline a lengthy jury trial in his courtroom. For those with lengthy jury trials before Judge Miller, *Norwest* is probably worth reading so as to become familiar with the types of procedures that Judge Miller might employ to expedite a lengthy trial (such as allocating total time available to each party, using deposition summaries, summarizing expert qualifications, and preparing document summaries).

XI. APPEALS

A. Waiver of Arguments

In *Massachusetts Bay Insurance v. VIC Koenig Leasing, Inc.*,⁹⁶ the Seventh Circuit noted the general rule that "we have *no obligation* to consider an issue . . . that is merely raised, but not developed, in a party's brief."⁹⁷ Although the Seventh Circuit proceeded to address the choice-of-law issue that was raised but not developed by the parties, it warned, "we must make abundantly clear to future litigants that this case does not stand for the proposition that a choice-of-law issue will always be preserved for appellate review if or whenever the parties . . . cite authorities from different jurisdictions."⁹⁸

B. Specification In Notice Of Appeal

In *Librizzi v. Children's Memorial Medical Center*,⁹⁹ the appellee sought to dismiss the appeal asserting that appellant's notice of appeal specified the judgment of January 1997 rather than the order of March 1997 denying reconsideration as the order under review. The Seventh Circuit denied the motion, writing:

But this is entirely proper. It is never necessary—and may be hazardous—to specify in the notice of appeal the date of an order denying a motion under Fed.R.Civ.P. 50 or 59. Identifying the final decision entered under Rule 58 as "the judgment, order, or part thereof appealed from" (Fed. R.App. P. 3(c)) brings up all of the issues in the

94. 1997 U.S. Dist. LEXIS 3282 (N.D. Ind. 1997).

95. *Id.*

96. 136 F.3d 1116 (7th Cir. 1998).

97. *Id.* at 1122 (quoting *Freeman United Coal Mining Co. v. Office of Worker's Compensation Programs, Benefits Review Board*, 957 F.2d 302, 304 (7th Cir. 1992)).

98. *Id.* (emphasis omitted).

99. 134 F.3d 1302 (7th Cir. 1998).

case. Pointing to either an interlocutory order or a post-judgment decision such as an order denying a motion to alter or amend the judgment is never necessary, unless the appellant wants to confine the appellate issues to those covered in a specific order. An appeal from the Rule 58 final judgment always covers the waterfront. The whole case is properly before us for decision.¹⁰⁰

XII. MISCELLANEOUS

A. Forum-Selection Clauses

In *Deans v. Tutor Time Child Care*,¹⁰¹ Chief Judge Barker transferred an action to the Southern District of Florida based on a forum-selection clause between the parties. Judge Barker held that the clause did not violate Indiana public policy and should be enforced.¹⁰²

B. Credit Card Payments At Clerk's Office

The Southern District of Indiana now accepts MasterCard and VISA for payment of filing fees, copies, and other fees paid to the clerk. For more information, call the clerk's office at (317) 229-3700.

C. Southern District Goes On-Line

The U.S. District Court for the Southern District recently introduced its own webpage, offering instant access to docket sheets, local rules, staff directory, and other useful information. The website is located at www.sdin.uscourts.gov.

100. *Id.* at 1306 (citation omitted).

101. 982 F. Supp. 1330 (S.D. Ind. 1997).

102. *Id.*

STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

ROSALIE BERGER LEVINSON*

INTRODUCTION

These materials explore state and federal constitutional law developments over the past year. The first part of this survey examines state constitutional law cases, and the remaining materials focus on state and federal court cases that raise significant and recurring federal constitutional issues.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

A. Parallel State Provisions Given Independent Significance

Following the invitation of Chief Justice Randall T. Shepard,¹ Indiana practitioners continue to invoke state constitutional provisions as a potential source for protecting civil liberties, and Indiana courts continue to refine their interpretation of these provisions. Much of the litigation this term focused on article I, section 23, the Equal Privileges Clause, article I, section 12, the “due course of law” guarantee, and article I, section 9, the Free Speech provision.

Indiana’s “Equal Privileges and Immunities” clause provides that “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”² In 1994, the Indiana Supreme Court in *Collins v. Day*,³ held that federal equal protection analysis, with its emphasis on suspect classes and fundamental rights, does not apply to article I, section 23.⁴ Looking to the purpose and intent of the framers, as well as early decisions interpreting this section, the court reasoned that the principal purpose of this anti-preference clause was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity—in particular to private commercial enterprises.⁵ The Indiana Supreme Court set forth the following standard for determining whether classification schemes are valid: the disparate treatment must be “reasonably related to inherent characteristics which distinguish the unequally treated classes,” and the “preferential treatment must be uniformly applicable and equally available to all persons similarly situated.”⁶ The court emphasized, however, that substantial deference must be given to the legislative

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1. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. IND. CONST. art. I, § 23.

3. 644 N.E.2d 72 (Ind. 1994).

4. *Id.* at 75.

5. *Id.* at 76-77.

6. *Id.* at 80.

judgment, which should be invalidated “only where the lines drawn appear arbitrary or manifestly unreasonable.”⁷ Applying this analysis, the court sustained an Indiana statute that excluded agricultural employers from worker’s compensation coverage⁸ because the plaintiffs failed to carry their burden “to negative every reasonable basis for the classification.”⁹

Most attempts by Indiana litigants to invalidate state legislative enactments under section 23 have been unsuccessful in light of the highly deferential approach set forth by the supreme court in *Collins*. For example, in *Gambill v. State*,¹⁰ the court upheld the validity of the verdict option of “Guilty but Mentally Ill,”¹¹ holding that the treatment accorded this class of people is reasonably related to the inherent characteristic shared by all in the class, namely mental illness.¹² Further, since it is “a pathway to treatment which is uniformly applicable and equally available to all persons who are found Guilty but Mentally Ill, the statute does not deny equal privileges within the meaning of article I, section 23.”¹³

Contrary to this trend, two appellate courts have ruled that the occurrence-based statute of limitations in Indiana’s Medical Malpractice Act¹⁴ violates section 23. In *Martin v. Richey*,¹⁵ plaintiffs challenged the medical malpractice statute of limitations, which differs from the general tort statute of limitations, because it provides that the statute begins to run at the occurrence of the alleged negligence rather than at the time the negligence is discovered.¹⁶ The appellate court reasoned that medical malpractice victims are treated differently under this type of limitations period inasmuch as other tort victims enjoy a discovery-based statute of limitations, thus implicitly granting them a special privilege or immunity.¹⁷ Although conceding that the classification scheme is “reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs,”¹⁸ the classification failed *Collins*’ requirement that the law apply equally to all persons who share the same inherent characteristics.¹⁹ The court acknowledged that under article I, section 23, judges must accord considerable deference to the manner in which the Indiana legislature has balanced the competing interests.²⁰ Statutes come to the court with the

7. *Id.*

8. IND. CODE § 22-3-2-9(a) (1993).

9. *Collins*, 644 N.E.2d at 81.

10. 675 N.E.2d 668 (Ind. 1996).

11. IND. CODE § 35-36-2-3 (1993).

12. *Gambill*, 675 N.E.2d at 677.

13. *Id.*

14. IND. CODE § 27-12-7-1 (1993).

15. 674 N.E.2d 1015 (Ind. Ct. App. 1997).

16. *Id.* at 1018.

17. *Id.* at 1022.

18. *Id.*

19. *Id.* at 1022-23.

20. *Id.* at 1021.

presumption of validity, requiring the challenger “to negative every conceivable basis” which might have supported the law.²¹ The court ruled nonetheless that “the medical malpractice statute of limitations creates an unequal burden on victims of medical negligence, thereby implicitly granting a special privilege or immunity to victims of other torts.”²²

The court also held that the medical malpractice occurrence-based statute of limitations violates article I, section 12 of the state constitution, which requires that every person who is injured “shall have remedy by due course of law.”²³ Looking again to the intent of the framers of the 1851 Constitution, the court reasoned that the purpose of this provision was to recognize the right of access to courts and the right to a complete tort remedy.²⁴ Further, the second clause of article I, section 12 emphasizes that “[j]ustice shall be administered freely . . . completely, and without denial.”²⁵ This demonstrates that the framers did not wish to confer upon the Indiana legislature any sort of broad powers, “especially not broad powers to abrogate the common law right to a remedy for tortious injuries.”²⁶ The court emphasized the responsibility of Indiana courts to conduct an independent constitutional analysis and noted that protections under the state constitution may be more extensive than those provided by its federal constitutional counterpart.²⁷ It concluded that the limitations provision contained in the malpractice statute was an unconstitutional abrogation of the right to a complete tort remedy guaranteed by article I, section 12.²⁸ Acknowledging the long line of cases previously sustaining these statutes as against a state constitutional challenge, the court reasoned that because of the substantial scholarly constitutional analysis that has emerged in recent years, it was not bound by the doctrine of *stare decisis*.²⁹

In *Harris v. Raymond*,³⁰ another appellate court adopted the reasoning and holding of *Martin* regarding both state constitutional claims, and similarly held that the occurrence-based two-year statute of limitations in plaintiff’s medical malpractice action was unconstitutional and that a discovery-based statute of limitations should apply equally to all medical malpractice claimants in the

21. *Id.*

22. *Id.* at 1022.

23. IND. CONST. art. I, § 12.

24. *Martin*, 674 N.E.2d at 1025.

25. *Id.*

26. *Id.*

27. *Id.* at 1026; *see also Valentin v. State*, 685 N.E.2d 1100, 1102 (Ind. Ct. App. 1997) (“Indiana’s double jeopardy analysis goes beyond the simple comparison of statutes called for under federal jurisprudence and the Indiana Supreme Court has found violations of Article I, § 14 where a single act constituted the basis for multiple punishments.”); *Ray v. State*, 679 N.E.2d 1364, 1366 (Ind. Ct. App. 1997) (unlike the Eighth Amendment, section 17 provides a state constitutional right to bail, not just a guarantee against excessive bail).

28. *Martin*, 674 N.E.2d at 1026.

29. *Id.*

30. 680 N.E.2d 551 (Ind. Ct. App. 1997).

state.³¹

Other courts have not been as eager to adopt the *Martin* court's analysis. In *Johnson v. Gupta*,³² the court sustained the occurrence-based statute of limitations.³³ As to article I, section 12, the court rejected the notion that this provision requires that every plaintiff have a remedy for injuries suffered.³⁴ To the contrary, it reasoned that the Indiana Constitution only prohibits the legislature from taking away vested property rights created by the common law, and that there is no vested property right in a remedy for a cause of action which has not accrued until after the time limitation has passed.³⁵ Further, according to a 1992 Indiana Supreme Court case, "the legislature has the power to modify or restrict common law rights and remedies in cases involving personal injury."³⁶ The Indiana legislature made a reasoned policy decision to ensure the availability of malpractice insurance for Indiana doctors and in turn medical services for Indiana residents: "[W]e find no compelling reason not to follow established precedent based upon sound analysis and reasoning. We reject the *Martin* Court's analysis of § 12 as unworkable."³⁷

The court also rejected the equal privileges challenge. Applying the *Collins* analysis, it reasoned that the disparate treatment, which was "based upon the claimant's status as patients and the fact that the injuries arose from a breach of the duty owed by a health care provider," was in direct response to the "financial uncertainties in the health care industry."³⁸ Thus there was a reasonable relationship between the legislation and the inherent characteristics which distinguishes the class receiving the unequal treatment.³⁹ The second prong of *Collins* was also met because all persons within the class of malpractice claimants are treated the same.⁴⁰ The fact that those who do not discover the malpractice within two years are not allowed to proceed is not different treatment because all malpractice claimants have the same two years from the date of

31. *Id.* at 552-53.

32. 682 N.E.2d 827 (Ind. Ct. App. 1997).

33. *Id.* at 829.

34. *Id.*

35. *Id.* at 830.

36. *Id.* (citing *State v. Rendleman*, 603 N.E.2d 1333, 1336 (Ind. 1992)); *see also* *Prior v. GTE N. Inc.*, 681 N.E.2d 768, 775 (Ind. Ct. App. 1997) (legislature may abrogate or restrict common law right as part of the State's police power without violating article I, section 12 as long as the limitation is not arbitrary or irrational; clause of telephone carrier's tariff limiting carrier's liability for omitting commercial customer's name from telephone directories to refund of listing charges paid by customer did not deny customer meaningful remedy under section 12 because the legislature had the power to restrict customer's common-law right to bring a negligent action as a rational means of keeping carrier's costs to a minimum without charging its customers unreasonable rate).

37. *Johnson*, 682 N.E.2d at 830.

38. *Id.* at 831.

39. *Id.*

40. *Id.*

occurrence to file a claim: “The unequal results caused by the statute of limitations can be harsh, but that does not render it unconstitutional because the limitation is reasonable in light of other policy considerations.”⁴¹ In dissent, Judge Friedlander agreed with the *Martin* analysis as to the article I, section 12 claim and thus would hold the occurrence-based statute of limitations unconstitutional.⁴²

In *McIntosh v. Melroe Co.*,⁴³ a similar constitutional challenge was made to the ten-year statute of repose in the Indiana Product Liability Act.⁴⁴ Relying on an earlier Indiana Supreme Court ruling on this issue, *Dague v. Piper Aircraft Corp.*,⁴⁵ the court rejected the article I, section 12 argument.⁴⁶ Although the opinion in *Dague* primarily addressed the “open courts” rather than the “remedy by due course of law” language of section 12, the court found *Dague*’s deferential approach controlling.⁴⁷ As to the article I, section 23 claim, the plaintiffs argued that although the statute facially applies to all manufacturers, it grants manufacturers of durable goods an immunity not given to all other manufacturers since only durable goods remain in use long enough to satisfy the ten-year statute of repose. The court held that it need not even apply *Collins* to this claim, reasoning that the statute treats all manufacturers the same, i.e., if a non-durable good survives to be consumed or used more than ten years after delivery, the statute of repose would bar any action arising out of injuries caused by that product.⁴⁸ Although conceding that the statute of repose does treat classes of tort victims differently; the distinguishing feature, age of the product, is an inherent difference which justifies disparate treatment to prevent stale claims and skyrocketing insurance costs.⁴⁹ Further, the statute applies uniformly and equally to all persons injured by products more than ten years old, thus satisfying the second prong of *Collins*.⁵⁰

A second area where the Indiana Supreme Court has charted a different course from federal constitutional analysis in interpreting a parallel state provision involves free speech rights. Article I, section 9 of the Indiana Constitution broadly guarantees free expression, but it also provides that speakers may be held accountable “for the abuse of that right.”⁵¹ In 1993, the court in

41. *Id.*

42. *Id.* (Friedlander, J., dissenting).

43. 682 N.E.2d 822 (Ind. Ct. App. 1997).

44. IND. CODE § 33-1-1.5-5(b) (1993).

45. 418 N.E.2d 207 (Ind. 1981).

46. *McIntosh*, 682 N.E.2d at 825.

47. *Id.*

48. *Id.* at 826.

49. *Id.* at 826-27.

50. *Id.*

51. “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.” IND. CONST. art. I, § 9.

*Price v. State*⁵² held that pure political speech is a “core value.”⁵³ The state cannot punish political speech, even in the context of resisting arrest, unless the political speech inflicts harm upon others “analogous to that which would sustain tort liability against the speaker.”⁵⁴ In essence, no abuse of the right could be found unless the political speech causes private harm. Although Price’s conduct in shouting profanities protesting the officer’s arrest may have created a public disturbance, it did not rise above the level of a “ fleeting annoyance” to the large group of “quarreling partygoers” who had congregated in this residential alley at 3:00 a.m. after a New Year’s Eve party.⁵⁵ Thus, even if Price’s speech could be deemed unprotected “fighting words” under First Amendment analysis, her conviction had to be overturned because of the state guarantee.⁵⁶

A second area where free speech rights have been afforded greater protection than under the federal Constitution involves the law of libel. The United States Supreme Court in *New York Times v. Sullivan*⁵⁷ declared that where an elected public official sues a “citizen critic” of government for defamation, the First Amendment mandates that the official demonstrate actual malice in order to recover damages.⁵⁸ The Court reasoned that the “central meaning” of the First Amendment guaranteed the right of citizens to criticize their government.⁵⁹ Thus, unless the official proves the statement was made with knowledge that it was false or with reckless disregard of its falsity there could be no recovery.⁶⁰ The Court expanded *Sullivan* to include defamation directed at non-elected public officials⁶¹ and private sector public figures,⁶² suggesting that the content of the libel was more important than the status of the plaintiff/victim. Indeed, in a 1971 plurality opinion, the Court in *Rosenbloom v. Metromedia, Inc.*,⁶³ suggested that the actual malice privilege for speech would be extended to all matters of public interest.⁶⁴

In 1974, the U.S. Supreme Court rejected the *Rosenbloom* plurality’s approach, which made content of the defamation the critical factor. Instead, the Court held that because the reputational interests of private plaintiffs are

52. 622 N.E.2d 954 (Ind. 1993).

53. *Id.* at 963.

54. *Id.* at 964.

55. *Id.* at 956, 964.

56. *Id.* at 964-65; *see also* *Whittington v. State*, 669 N.E.2d 1363, 1369 (Ind. 1996) (if speech is not political, and the burden of proof is on the claimant to establish this, the state is free to sanction it provided it reasonably concludes the expression is an “abuse” within the meaning of section 9).

57. 376 U.S. 254 (1964).

58. *Id.* at 280.

59. *Id.* at 274-80.

60. *Id.*

61. *See Rosenblatt v. Baer*, 383 U.S. 75 (1966).

62. *See Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

63. 403 U.S. 29 (1971).

64. *Id.* at 52.

weightier, they should be permitted to recover upon a showing of mere negligence.⁶⁵ In *Gertz v. Robert Welch, Inc.*,⁶⁶ the Court in a 5-4 opinion found that private plaintiffs deserved greater protection and should not be held to the actual malice standard.⁶⁷ The Court reasoned that the private figure does not voluntarily enter the vortex of public controversy or debate, like public figures or public officials.⁶⁸ Further, the private plaintiff lacks the means of self-help access to the media available to the public victim.⁶⁹ However, expressing concern for self-censorship, the Court concluded that where the speech addresses matters of public interest, states cannot apply strict liability, but instead may impose liability only where negligence is established.⁷⁰ Further, while compensatory damages may be available based on a finding of negligence, the actual malice standard must still be met in order to recover punitive damages.⁷¹

Soon after *Gertz*, an Indiana appellate court rejected the U.S. Supreme Court's approach and determined that section 9 mandated more protection for allegedly libelous material. Favoring the *Rosenbloom* analysis, it held that private individuals who bring a libel action involving an event of general or public interests must prove that the defamatory falsehood was published with actual malice.⁷² In 1990, another Indiana appellate court reiterated the rule that section 9 requires that interchange of ideas on all matters of public or general interest be unimpaired.⁷³ In short, section 9 creates a constitutional privilege regarding publication of all matters of general concern, regardless of whether the defamed party is a private or public individual.

Following this well-established case precedent, the Indiana Court of Appeals in *Journal-Gazette Co. v. Bandido's, Inc.*,⁷⁴ applied the actual malice standard and rejected a libel claim against a newspaper that allegedly "defamed" Bandido's restaurant by suggesting that rats had been discovered at its

65. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

66. *Id.*

67. *Id.* at 343-44.

68. *Id.*

69. *Id.* at 344.

70. *Id.* at 346-48.

71. *Id.* at 349.

72. *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 58 (Ind. App. 1974).

73. See *Near East Side Community Org. v. Hair*, 555 N.E.2d 1324, 1328 (Ind. Ct. App. 1990); see also *Moore v. University of Notre Dame*, 968 F. Supp. 1330, 1336 (N.D. Ind. 1997) (because under Indiana law a private individual may recover for injury caused by defamation only if he can prove the publication was made with actual malice, it is unnecessary to determine whether former offensive line football coach at University was a public figure or private individual; further, coach failed to establish actual malice on the part of the University and head football coach as required to establish liability); *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1087 (7th Cir. 1990) ("[n]o Indiana court has disagreed with *Aafco*, and four years ago we took *Aafco* to be the established law of Indiana").

74. 672 N.E.2d 969 (Ind. Ct. App. 1996), vacated by 690 N.E.2d 1183 (Ind. 1997).

establishment in Indianapolis.⁷⁵ The jury had awarded significant damages (\$985,000), but the appellate court determined that the record would not support a finding of actual malice. The sub-heading in an article that described closing the restaurant by the health board erroneously used the word "rat" instead of rodent. The court of appeals held that "[e]vidence of an extreme departure from professional journalistic standards, without more, cannot provide a sufficient basis for finding actual malice."⁷⁶ The court reasoned that while "the Journal may well have been extremely careless in printing the subheadline with the word 'rats', there is not sufficient clear and convincing evidence to demonstrate that the paper had knowledge that the headline was false or that the paper entertained serious doubts as to the truth of the headline."⁷⁷ Even though the evidence suggested that the Journal fell below reasonable journalistic standards and violated its own policy, this alone does not constitute actual malice.⁷⁸ The Indiana Supreme Court, which has never ruled on the issue, has accepted the parties' invitation to determine whether Indiana should join the vast majority of states who utilize a negligence standard, rather than an actual malice standard, when the victim of libelous material is a private individual.⁷⁹

B. Provisions Unique to the State Constitution

In addition to the numerous provisions in the Indiana Constitution that parallel federal guarantees, there are several unique provisions that practitioners invoked this past year. In *Ratliff v. Cohn*,⁸⁰ Donna Ratliff, who set a fire that burned down her home and killed her mother and sister, was incarcerated at the Indiana Women's Prison even though she was only fourteen years old. Ratliff argued that article IX, section 2 of the Indiana Constitution, which states that, "[t]he General Assembly shall provide institutions for the correction and reformation of juvenile offenders," prohibits the incarceration of juveniles with adults.⁸¹ The court noted that this provision was unique in that no analogue exists either in the U.S. Constitution or in any other state constitution.⁸² The court emphasized the need for state courts to "give life to the unique provisions of its own constitution" so as not to deprive "the people of its state the double

75. *Id.* at 972.

76. *Id.* (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989)).

77. *Journal-Gazette Co.*, 672 N.E.2d at 973.

78. *Id.*

79. Only Alaska, Colorado and New Jersey still use the "actual malice" standard for private victims of libel. *See Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979); *Diversified Management v. The Denver Post*, 653 P.2d 1103 (Colo. 1982); *Sisler v. Gannett Co., Inc.*, 516 A.2d 1083, 1095 (N.J. 1986).

80. 679 N.E.2d 985 (Ind. Ct. App. 1997), *vacated* by 693 N.E.2d 530 (Ind. 1998).

81. IND. CONST. art. IX, § 2.

82. *Ratliff*, 679 N.E.2d at 986.

security the nation's founding fathers intended to provide.”⁸³ Further, the court noted that “the Indiana Constitution was framed to be strictly observed by all public officials and particularly by the courts as the guardians of the citizens' rights stated therein.”⁸⁴

Looking to the legislative history behind article IX, the court found that the intent of the framers was to abolish the practice of incarcerating juveniles with adult offenders by requiring the general assembly to provide separate institutions for the correction and reformation of juvenile offenders.⁸⁵ In fact, the first Indiana statute providing for the waiver of juvenile offenders into adult criminal courts specifically stated that juvenile offenders would be incarcerated separately from adult offenders. It was not until 1979 that the legislature repealed the statutory requirement that juvenile offenders be incarcerated separately.⁸⁶ Based on its interpretation of the constitution, the court mandated Ratliff's transfer to an appropriate rehabilitative juvenile treatment facility.⁸⁷ A petition to transfer was granted and the Indiana Supreme Court heard argument on December 9, 1997, on the constitutionality of incarcerating minors in adult prisons.⁸⁸ At the time of the hearing, there were eighty-eight inmates under eighteen who, unlike Ratliff, have been confined to Indiana's adult prisons.⁸⁹

Other challenges under “unique” state constitutional provisions fared less well. For example, Indiana litigants unsuccessfully invoked article IV, section 22,⁹⁰ which prohibits the general assembly from passing local or special laws, and article IV, section 23,⁹¹ which provides that all laws must be “general, and of uniform operation throughout the State.” Although literally these provisions might be viewed as imposing a fairly restrictive requirement on legislation, the Indiana Supreme Court has given the general assembly much leeway to enact “special” laws. In *Indiana Gaming Commission v. Moseley*,⁹² the court emphasized that although the framers expressed a preference for general laws, at the same time they recognized that in many situations special laws may be necessary and that courts must grant a “high degree of deference to the legislature on section 23 questions.”⁹³ The court's decision in *State v. Hoovler*⁹⁴

83. *Id.*

84. *Id.*

85. *Id.* at 987.

86. *Id.*

87. *Id.* at 988.

88. *Two Teens Going to Adult Prison*, GARY POST TRIB., Nov. 27, 1997, at B7.

89. *Id.*

90. There are 16 subject matters for which legislative authority regarding “special laws” is restricted, including crimes, misdemeanors, court practices, divorce, regulating county and township business, and tax assessment. IND. CONST. art. IV, § 22.

91. “In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.” *Id.* § 23.

92. 643 N.E.2d 296 (Ind. 1994).

93. *Id.* at 300 (The court sustained a riverboat gambling statute that allowed for a county-

reflects this deferential approach. The case involved an economic development income tax statute that effectively permitted only one county in the state to take advantage of an increased tax rate.⁹⁵ The special rate was available only to counties with a population of more than 129,000 but less than 130,600, thus essentially limiting application of the statute to Tippecanoe County, Indiana.⁹⁶ Previous cases had held that such population classifications may satisfy the "general law" mandate provided the terms of the statute permit other units to eventually qualify.⁹⁷ The majority in *Hoovler*, however, questioned this approach stating that, "the mere presence of a population restriction does not convert an otherwise special law into a general and uniform law."⁹⁸

The court nonetheless found that this "special" law was constitutional, by looking beyond the statutory classification to "other circumstances surrounding" the enactment.⁹⁹ Tippecanoe County contained a landfill that the U.S. Environmental Protection Agency (EPA) determined was an environmental hazard.¹⁰⁰ Under federal Superfund legislation, Tippecanoe County had been identified as potentially responsible regarding the cost to clean up the landfill.¹⁰¹ The Indiana Supreme Court noted the "staggering" nature of the liability, but also that the costs associated with determining the extent of the liability could be reduced substantially if the parties entered into a consent decree within a limited time period.¹⁰² Without a statute allowing for an increase in tax rates, the county would lack the resources to enable it to enter into the consent decree and thus lose the opportunity to reduce the clean-up costs.¹⁰³ Because of these "other circumstances," the court concluded that "permitting increased taxes due to Tippecanoe County's unique exposure to Superfund liability is not a matter necessarily subject to a general law uniformly applicable in all counties."¹⁰⁴ Thus, the law was held not to violate article IV, section 23.

In *Indiana State Teachers Ass'n v. Board of School Commissioners*,¹⁰⁵ an

wide vote in favor of riverboat gambling rather than a city-wide vote depending upon the number of inhabitants in the area). The court ruled that the population restrictions were reasonable and thus article IV had not been violated. *Id.* at 301.

94. 668 N.E.2d 1229 (Ind. 1996).

95. *Id.* at 1234.

96. *Id.*

97. *Id.* at 1233 n.3 (citing *State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 76-78 (Ind. 1982)).

98. *Id.* Two justices concurred in the result but disagreed with this shift in position and would have held that population-based categories "fulfill the requirements for a valid general law." *Id.* at 1236 (Sullivan, J., and DeBruler, J., concurring).

99. *Id.* at 1234-35.

100. *Id.*

101. *Id.*

102. *Id.* at 1235.

103. *Id.*

104. *Id.*

105. 679 N.E.2d 933 (Ind. Ct. App. 1997).

appellate court applied *Hoovler* to a state statute, which provided for reformation of the Indianapolis Public Schools (IPS) and contained limitations on the subject matter of collective bargaining that affected IPS teachers.¹⁰⁶ Because, as in *Hoovler*, the law used a population classification which effectively meant that only Marion County and the Indianapolis Teachers Association were affected,¹⁰⁷ the court reasoned that this was a special law.¹⁰⁸ Nonetheless, the law was sustained because the legislature could have reasonably concluded that unique circumstances, namely low test scores, low attendance and the need for remedial education that existed in the Indianapolis Public Schools “could not be adequately addressed through a general law.”¹⁰⁹ In short, the court has interpreted this section to preclude special laws but to allow the legislature to defend such laws whenever the subject matter “is not amenable to a general law of uniform operation throughout the state.”¹¹⁰

The statute in question in *Indiana State Teachers Ass'n* was also challenged under article IV, section 19, which requires that laws be “confined to one subject and matters properly connected therewith.”¹¹¹ The purpose of mandating that the subjects in a single statute be germane to each other is to prevent so-called “logrolling” legislation.¹¹² The court emphasized the general principle that Indiana courts will accord every reasonable presumption of validity to statutes, and the challenger must overcome that presumption by “clearly demonstrating the provision to be invalid.”¹¹³ Although acknowledging the importance of section 19, the court also noted that the Indiana Supreme Court has taken a laissez-faire approach in applying the single-subject requirement.¹¹⁴

In this case, the general assembly passed a law that restricted the collective bargaining rights of public school teachers in Indianapolis as part of the state’s budget legislation after the law “failed to pass on its own merits.”¹¹⁵ Thus, as the court remarked, “[t]his is the very logrolling that Section 19 of our Constitution was designed to prevent.”¹¹⁶ The court also noted that a very weak connection existed between the budget of the state and a restriction on the rights of Indianapolis school teachers to bargain collectively.¹¹⁷ Nonetheless, the court held that since the legislature linked matters of state and local administration, a

106. *Id.* at 936 (citing IND. CODE § 20-3.1-1-1 (1993)).

107. *State Teachers Ass'n*, 679 N.E.2d at 936.

108. *Id.* at 937.

109. *Id.* at 937-38.

110. *Id.* at 938.

111. IND. CONST. art. IV, § 19.

112. “Legislators combine two unrelated bills, each without sufficient support to pass on its own, in order to accumulate the requisite number of votes to pass both.” *Bayh v. Indiana St. Bldg. & Const. Trades Council*, 674 N.E.2d 176, 179-80 (Ind. 1996).

113. *State Teachers Ass'n*, 679 N.E.2d at 934 (quoting *Hoovler*, 668 N.E.2d at 1232).

114. *Id.* at 935.

115. *Id.*

116. *Id.*

117. *Id.*

combination previously recognized as meeting the requirement that the law contain a single subject, it did not offend article IV, section 19.¹¹⁸ The court acknowledged that Justice Dickson has persuasively criticized this deferential standard¹¹⁹ but it felt bound by the supreme court's broad approach to analyzing legislative acts for single-subject violations and the court's "implied invitation to the General Assembly" to enact such laws.¹²⁰

II. FEDERAL CONSTITUTIONAL LAW

A. Procedural Due Process

In deciding whether procedural due process rights have been violated, the U.S. Supreme Court applies a two-pronged analysis, (1) requiring that a plaintiff initially identify a property or liberty interest, and, (2) assuming this burden is met, balancing the competing interests to determine whether sufficient procedural safeguards have been afforded.¹²¹ As to the latter step, the court balances (a) the private interests affected; (b) the risk of erroneous deprivation and the value of additional procedural safeguards; and (c) the government's interests.¹²² This analysis is well established and Indiana courts have consistently followed it.¹²³

The most significant U.S. Supreme Court case addressing procedural due process this term was *Gilbert v. Homar*.¹²⁴ That case involved a state university policeman, Richard Homar, who was suspended without pay following his arrest by state police on drug felony charges. Although the criminal charges were dismissed about a week after the arrest, the suspension remained in effect, and Homar was not given the opportunity to tell his side of the story for almost three weeks. Relying on the Supreme Court decision in *Cleveland Board of Education v. Loudermill*,¹²⁵ Homar argued that he was entitled to at least a limited hearing prior to his suspension, to be followed by a more comprehensive post-suspension hearing. The Court, however, unanimously ruled that *Loudermill* does not apply to a suspension without pay in all circumstances, and that due process requires a flexible case-by-case balancing of the interests.¹²⁶ Applying the *Mathews* balancing test, the Court noted that Homar's interest in an uninterrupted paycheck must be judged in light of the length and finality of the temporary deprivation, and here the lost income was relatively insubstantial.¹²⁷ Second, the state had a significant interest in immediately suspending employees charged

118. *Id.* at 936.

119. *Id.* at 935 (citing *Pence v. State*, 652 N.E.2d 486, 489 (Ind. 1995)).

120. *Id.*

121. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

122. *Id.* at 334-35.

123. See, e.g., *Dible v. City of Lafayette*, 678 N.E.2d 1271, 1277 (Ind. Ct. App. 1997).

124. 117 S. Ct. 1807 (1997).

125. 470 U.S. 532 (1985).

126. *Gilbert*, 117 S. Ct. at 1812.

127. *Id.* at 1813.

with felonies who occupy positions of public trust and visibility, such as police officers.¹²⁸ Most importantly, the risk of erroneous deprivation was low. The purpose of a pre-suspension hearing is to ensure reasonable grounds to support the suspension without pay, but this is already assured by the arrest and the formal filing of charges.¹²⁹ The court remanded the case, however, to determine whether defendants violated Homar's due process rights by failing to provide a sufficiently prompt post-suspension hearing.¹³⁰

B. Substantive Due Process

The U.S. Supreme Court has recognized that the Due Process Clause also contains a substantive component that bars arbitrary, wrongful conduct. Where the government interferes with a fundamental right, the Court has demanded that government meet a strict scrutiny standard. The measure must be narrowly tailored to support a compelling government interest. Where no fundamental right is identified, however, the Court generally has been very reluctant to find a substantive due process violation, requiring that the plaintiff demonstrate that the government has acted in a truly "conscience-shocking" fashion before it will intervene.

In *Sightes v. Barker*,¹³¹ the Indiana appellate court applied a more nuanced approach to a substantive due process claim. A grandmother, who was the mother of a child's biological father, petitioned to establish visitation under Indiana's Grandparent Visitation Act.¹³² The mother and her new husband moved to dismiss the petition, alleging that the state statute unconstitutionally burdened their autonomous right as parents to raise their child. While recognizing the fundamentality of parental rights, the court noted that "family autonomy is not absolute," and that "the degree of the infringement by the state" must be examined to determine whether or not the statute is unconstitutional.¹³³ The court reasoned that permitting grandparent visitation over the parents' objection did not unconstitutionally impinge upon the integrity of the family since the statutory scheme did not grant visitation unless a verified petition was filed, a hearing conducted, and a decree entered with findings that this would best

128. *Id.*

129. *Id.* at 1813-14.

130. *Id.* at 1814; *see also Van Harken v. City of Chicago*, 103 F.3d 1346, 1352-53 (7th Cir. 1997) (city's procedures for dealing with parking violations which did not require officer who wrote parking ticket to appear at hearing while allowing hearing officers to cross-examine drivers did not violate due process because benefits of requiring police officers' presence did not exceed costs); *cf. Porter v. DiBlasio*, 93 F.3d 301, 306-07 (7th Cir. 1996) (animal owner is entitled to notice and an opportunity for a hearing prior to permanent termination of interest in seized animals).

131. 684 N.E.2d 224 (Ind. Ct. App. 1997).

132. IND. CODE §§ 31-17-5-1 to -10 (Supp. 1997).

133. *Sightes*, 684 N.E.2d at 229. The court analogized to the abortion cases where the Supreme Court has reasoned that only laws that unduly burden the right trigger strict scrutiny. *Id.* at 229-30.

serve the interests of the child.¹³⁴ Citing several cases where other states' grandparent visitation statutes have been sustained, it similarly concluded that the statute was "rationally related to furthering the legitimate state interest in fostering relationships between grandparents and their grandchildren."¹³⁵ Finally, the court noted that even if strict scrutiny is applied, the state has a compelling interest in protecting the best interests of the child and in maintaining the right of association of grandparents and grandchildren.¹³⁶

A substantive due process question of growing significance is the extent to which due process imposes a limitation on the jury's power to impose punitive damages. In *BMW of North America, Inc. v. Gore*,¹³⁷ the Supreme Court held that a \$2 million punitive damages award was grossly excessive and therefore exceeded constitutional limits.¹³⁸ An Alabama jury had awarded \$4 million against BMW for failing to disclose that it repainted a new \$40,000 car, thereby reducing its value by \$4,000.¹³⁹ The Alabama Supreme Court reduced the award to \$2 million, but the U.S. Supreme Court concluded that that award, too, was excessive.¹⁴⁰ It outlined three criteria in reaching its conclusion: (1) the conduct was not particularly reprehensible in that it involved only economic harm and it evinced no reckless disregard for the health or safety of others; (2) punitive damages were 500 times the amount of compensatory damages; and (3) the remedy was out of proportion to civil remedies authorized or imposed in comparable cases.¹⁴¹

In *Schimizzi v. Illinois Farmers Insurance Co.*,¹⁴² a federal district court in Indiana applied these factors in determining that a \$600,000 award was excessive. Even though the defendants did not raise a substantive due process challenge, the court noted that the inquiry in *Gore* was "akin to that posed" in a case seeking to determine whether under Indiana law an award is "grossly excessive."¹⁴³ Applying the three *Gore* "guideposts," the court concluded that the award was grossly excessive since the defendant's tortious conduct consisted primarily of an insurance carrier's omissions in reckless disregard of plaintiff's rights under the policy, and no reckless disregard for health or safety.¹⁴⁴ The disparity between actual and punitive damages was great because the award was thirteen times actual damages, and the award was disproportionate as compared to criminal and civil penalties imposed for similar conduct—under Indiana law

134. *Id.* at 230.

135. *Id.* at 232.

136. *Id.* at 233.

137. 116 S. Ct. 1589 (1996).

138. *Id.* at 1598.

139. *Id.* at 1594.

140. *Id.* at 1598.

141. *Id.* at 1599-1603.

142. 928 F. Supp. 760 (N.D. Ind. 1996).

143. *Id.* at 785.

144. *Id.* at 785-87.

every felony is punishable by a maximum fine of \$10,000.¹⁴⁵ The court concluded that the \$600,000 award was thus "monstrously excessive and without rational connection to the evidence."¹⁴⁶

Similarly in *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*¹⁴⁷ the court noted that the federal standards set forth in *BMW* are quite similar to those examined under Indiana law.¹⁴⁸ Indiana courts have identified as the critical factors the nature of the tort, the extent of actual damages sustained, and the economic wealth of the defendant.¹⁴⁹ In *Creative Demos*, the jury had awarded \$6.5 million in punitive damages against a wholesale grocery corporation accused of violating Indiana law by fraudulently inducing the plaintiff to take action adverse to its interests. The court ruled that even if the evidence supported a punitive damages award, the amount was grossly excessive.¹⁵⁰ Although the grocery corporation had a large size and net worth, the harm caused by the misrepresentations was purely economic, the ratio of punitive to compensatory damages was 47,445:1, and the award was out of line with Indiana public policy.¹⁵¹

Outside the area of punitive damages, the courts have shown a great reluctance to intervene under the somewhat amorphous substantive due process provision. For example, in *Hill v. Shobe*,¹⁵² the Seventh Circuit rejected a motorist's substantive due process claim against a police officer who drove through a red light and collided with the motorist's vehicle. The court held that for the defendant to be reckless in a constitutional sense, he must be criminally reckless: "The fact that a public official committed a common law tort with tragic results fails to rise to the level of a violation of substantive due process."¹⁵³ Rather, "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation . . . absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it."¹⁵⁴ The court specifically found that it would be insufficient for

145. See IND. CODE §§ 35-50-2-4 to -7 (1993 & Supp. 1997).

146. 928 F. Supp. at 786.

147. 955 F. Supp. 1032 (S.D. Ind. 1997).

148. *Id.* at 1042.

149. *Id.*

150. *Id.* at 1042-44.

151. *Id.*

152. 93 F.3d 418 (7th Cir. 1996).

153. *Id.* at 421.

154. *Id.* The court also ruled that the police officer's failure to provide medical care to the injured motorist did not violate due process because government has no affirmative constitutional duty to provide emergency medical services to its citizens. *Id.* at 422. See also *Stevens v. Umsted*, 131 F.3d 697, 701-06 (7th Cir. 1997) (child who was repeatedly sexually assaulted by other students at the Illinois School for the Visually Impaired even after the superintendent was put on notice of the assault, failed to state a claim under the substantive due process clause because the state neither took Stevens into custody, confining him against his will, nor did it create the danger or render him more vulnerable to an existing danger; inaction by the state in face of a known danger is not enough to trigger the obligation to protect private citizens from each other, and the

plaintiffs to prove that the officer knew that driving at high speed at night without lights could have potentially fatal consequences; instead, “plaintiffs were required to demonstrate that [the defendant] was willing to let a fatal collision occur.”¹⁵⁵

In *Mays v. City of East St. Louis, Illinois*,¹⁵⁶ the Seventh Circuit went even further, and rejected the substantive due process claim entirely. First, the court found that the police officer’s high-speed pursuit of a vehicle resulting in injury did not give rise to a Fourth Amendment seizure. It then held that the

superintendent had no constitutional duty to protect the child); *Wallace v. Adkins*, 115 F.3d 427, 430 (7th Cir. 1997) (prison guard failed to show that officials affirmatively placed him in position of danger by assigning him to prison unit with prisoner who had previously threatened to kill guard, despite fact that guard was ordered to stay on duty, where guard could not show that order created dangers other than those guard would have faced in absence of order to stay); *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1175-76 (7th Cir. 1997) (bar fight participant was not in police custody either in bar parking lot or when he was driven by police to nearby service station where officer told him he was free to leave; thus, no “special relationship” implicating due process duty to provide protective services existed so as to hold entity liable for ensuing death by automobile); *Nabozny v. Podlesny*, 92 F.3d 446, 459-60 (7th Cir. 1996) (student could not maintain claim that school officials violated due process by creating risk of harm or exacerbating existing risk of harm in connection with their alleged failure to protect student from harassment by other students based on his sexual orientation because, although student presented evidence to show officials failed to act and that their failure to act was intentional, they had no affirmative duty to act absent evidence that their failure itself placed student in danger or increased pre-existing threat of harm).

155. *Id.*; see also *Mathis v. Fairman*, 120 F.3d 88, 91-92 (7th Cir.), cert. denied, 118 S. Ct. 603 (1997) (for pre-trial detainee to claim substantive due process violation, prison official must have been deliberately indifferent to substantial risk of serious harm and thus official who could not have been aware of suicide risk of detainee who was evaluated by mental health specialist and found to pose no danger to himself was not deliberately indifferent and thus not subject to substantive due process claim); *West v. Waymire*, 114 F.3d 646, 651-52 (7th Cir.), cert. denied, 118 S. Ct. 337 (1997) (town cannot be held liable for police officer’s intimidation of teenage girl to provide sex; although the law in this circuit is unclear as to whether criminal recklessness is a sine qua non for due process liability, at minimum, defendant must make a deliberate choice and although “[s]lackness, laxness, cronyism, confusion, and dumbness there were in profusion,” plaintiff could not show that there was “an obvious risk” that the officer was a child molester); *Weinberger v. Wisconsin*, 105 F.3d 1182, 1186-87 (7th Cir.), cert. denied, 118 S. Ct. 336 (1997) (since probation officer was not reckless in failing to visit home of probationer who was later discovered to be cannibalistic serial killer, officer was not liable in civil rights action brought by parents of victim; reckless conduct is that which is criminally reckless, i.e., conduct that reflects complete indifference to risk and so allows inference of actor’s knowledge or intent). But cf. *Wudtke v. Davel*, 128 F.3d 1057, 1063-64 (7th Cir. 1997) (teacher’s substantive due process claim against school district superintendent alleging sexual assaults and harassment stated a claim based on a liberty interest in bodily integrity; in a case of first impression, the court concluded that serious physical assaults under circumstances where the assaulter is enabled to take his actions because of his government position does rise to the level of a constitutional tort).

156. 123 F.3d 999 (7th Cir. 1997).

“reasonableness” of the pursuit was not subject to any further analysis under substantive due process because “[t]his nation’s social and legal traditions do not give [automobile] passengers a legal right . . . to have police officers protect them by letting criminals escape.”¹⁵⁷ Any “rights” beyond the Fourth Amendment must come from the political process or the common law.¹⁵⁸ The Supreme Court has agreed to resolve the conflict in the circuits regarding the appropriate standard that should govern substantive due process claims challenging a high-speed police chase that culminates in injury or death.¹⁵⁹ Perhaps it will address the more fundamental question of when tortious conduct rises to the level of a *constitutional* tort.

C. Free Speech Rights

1. *The New Frontier*.—Last term the Supreme Court was asked to apply First Amendment doctrine to the cable and telecommunications industries. The Court previously held that the broadcast media may be subjected to greater government regulation than the written press because of economic scarcity, public ownership of the airwaves, and the fact that broadcasting invades the privacy of the home and is uniquely accessible to children.¹⁶⁰ Difficult questions have been raised as to whether this same, more deferential approach should be applied to cable and the Internet. In 1994, the Supreme Court ruled in *Turner Broadcasting System, Inc. v. FCC*¹⁶¹ (Turner I), that the cable industry enjoyed the same stringent First Amendment protection as the written press. It found no economic or physical scarcity argument to support greater government regulation. Following well-established Supreme Court precedent, the Court held that the “must-carry” provision of the Cable Television Consumer Protection and Competition Act,¹⁶² which requires cable television systems to devote some of their channels to the transmission of local commercial and public broadcast stations, was a content-neutral regulation of speech subject to the intermediate level of scrutiny under the First Amendment.¹⁶³ Under this standard, the “must-carry” provisions could be upheld only if they furthered important government interests and did not burden substantially more speech than necessary to further those interests.¹⁶⁴ The Court remanded for a determination of whether Congress had adequate factual support for its conclusion that “must-carry” was

157. *Id.* at 1003.

158. *Id.* at 1004-05.

159. *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997).

160. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

161. 512 U.S. 622 (1994).

162. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 534 (1994)).

163. *Turner I*, 512 U.S. at 662.

164. *Id.*

necessary.¹⁶⁵

In *Turner Broadcasting System, Inc. v. FCC*¹⁶⁶ (Turner II), the Court ruled 5-4 that the Cable Television Act met this intermediate scrutiny standard. Justice Kennedy found a “substantial body of evidence” before Congress during the three years of pre-enactment hearings indicating that “must-carry” serves at least two important governmental interests: preserving the benefit of free, over-the-air local broadcast television, and promoting the widespread dissemination of information from a multiplicity of sources.¹⁶⁷ Further, substantial evidence supported Congress’ determination that a significant number of local broadcast stations would be refused carriage on cable systems absent the “must-carry” requirement, and without the congressional mandate, these local broadcast stations would be at serious financial risk and would deteriorate or fail.¹⁶⁸ Thus, the “must-carry” requirement served the government’s important interests in a direct and effective way.

As to the second prong of intermediate scrutiny, the Court held that the provisions did not burden substantially more speech than was necessary.¹⁶⁹ It found that the mandate did not affect the majority of cable operators in a significant way because they had simply used previously unused channel capacity, and 94.5% had not been forced to drop any programming to comply with the mandate.¹⁷⁰ Acknowledging that many broadcasters would survive without cable access, the Court held that it would not invalidate this remedial scheme merely because some alternative solution was marginally less intrusive on a speaker’s First Amendment interest.¹⁷¹ It found that Congress took adequate steps to confine both the breadth and the burden of the regulatory scheme.¹⁷²

Four Justices argued in dissent, as they did in *Turner I*, that the Act should not be analyzed as a content-neutral provision. Because the purpose of the Act was to increase diversity of viewpoint, it should be reviewed as a content-based restriction that must be subject to strict, not intermediate, scrutiny.¹⁷³ However, even applying intermediate scrutiny, the dissent reasoned that the Court gave too much deference to Congress’ predictive judgment and its evaluation of complex economic questions: “A highly dubious economic theory has been advanced as the ‘substantial interest’ supporting a First Amendment burden on cable operators and cable programmers.”¹⁷⁴ Moreover, the means were not narrowly tailored: “Congress has commandeered up to one-third of each cable system’s channel capacity for the benefit of local broadcasters without any regard for

165. *Id.* at 668.

166. 117 S. Ct. 1174 (1997).

167. *Id.* at 1186-87, 1196.

168. *Id.* at 1190-97.

169. *Id.* at 1198.

170. *Id.* at 1198-99.

171. *Id.* at 1199-1200.

172. *Id.* at 1199.

173. *Id.* at 1205-06.

174. *Id.* at 1215.

whether doing so advances the statute's alleged goals."¹⁷⁵ The dissenting Justices believed the law was substantially broader than necessary to achieve the government's purported goals and thus should not have been upheld.¹⁷⁶

In a case of first impression, the Court held that the Internet, like cable and unlike broadcast media, also enjoys the fullest degree of First Amendment protection. In *Reno v. American Civil Liberties Union*,¹⁷⁷ the Court held invalid provisions of the 1996 Communications Decency Act (CDA)¹⁷⁸ that criminalized the knowing on-line transmission of "indecent" and "patently offensive" materials to minors.¹⁷⁹ Further, the Act made it a crime to use an "interactive computer service" to knowingly send or display to a person under age 18 a communication "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."¹⁸⁰ The Act contained affirmative defenses for those who in good faith took effective actions to restrict access by minors or who restricted such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number.¹⁸¹ Despite these defenses, the Supreme Court held that the CDA's proscriptions abridged First Amendment rights.¹⁸²

To justify its enactment, the government relied on two Supreme Court decisions. In *FCC v. Pacifica Foundation*,¹⁸³ the Supreme Court upheld a Federal Communications Commission ruling that the afternoon broadcast of comedian George Carlin's recorded monologue entitled "Filthy Words" could be subject to administrative sanctions.¹⁸⁴ Further, in *Ginsberg v. New York*,¹⁸⁵ the Court sustained a statute which barred sale of material to minors that was considered obscene as to them, even if not obscene as to adults.¹⁸⁶ Distinguishing this case precedent, the Court reasoned that the CDA did not allow for parental consent or parental participation in the communication.¹⁸⁷ Further, unlike the *Ginsberg* statute, the CDA was not limited to materials "utterly without redeeming social importance for minors" and it did not define the term "indecent."¹⁸⁸ It also did not save material that had serious literary, artistic, political, or scientific worth and it applied to all persons under 18, rather than the

175. *Id.* at 1216.

176. *Id.* at 1216-17.

177. 117 S. Ct. 2329 (1997).

178. 47 U.S.C. § 223 (1994).

179. *Reno*, 117 U.S. at 2351.

180. 47 U.S.C. § 223(a)(1)(B)(ii), (d)(1)(A)-(B).

181. *Reno*, 117 S. Ct. at 2349.

182. *Id.* at 2351.

183. 438 U.S. 726 (1978).

184. *Id.* at 750-51.

185. 390 U.S. 629 (1968).

186. *Id.* at 644.

187. *Reno*, 117 S. Ct. at 2343.

188. *Id.* at 2341.

17 year age of majority used in *Ginsberg*.¹⁸⁹ In addition, unlike the sanctions imposed in *Pacifica*, CDA's provisions were not limited to particular times and they imposed criminal rather than merely civil penalties.¹⁹⁰ Finally, the FCC order in *Pacifica* applied to radio, which has historically received the "most limited First Amendment protection."¹⁹¹

More generally, the Court held that the special factors justifying regulation of the broadcast media—the history of extensive government regulation of broadcasting, the scarcity of available frequencies at its inception, and its "invasive" nature—are not present in cyberspace and thus these cases do not provide a basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet.¹⁹² The affirmative defenses to liability were ephemeral since the government offered no evidence of a reliable way to screen newsgroup and chat room participants for age, nor would it be possible to block children's access to indecent and patently offensive material without also blocking their access to protected material.¹⁹³ Requiring credit card verification would be costly, perhaps forcing many non-commercial Websites to shut down and would also block access by adults without credit cards. Adult passports would impose significant burdens on non-commercial sites, and it was uncertain that any of these devices would truly ensure that the user was over eighteen.¹⁹⁴

Although acknowledging that the government has an important interest in protecting children from potentially harmful materials, the Court reasoned that the CDA pursued that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive.¹⁹⁵ The Court refused to defer to the congressional judgment that nothing short of an outright ban would effectively prevent minors from accessing indecent communications. Because of the breadth of the statute, the burden on adult speech was unacceptable if less restrictive alternatives could be used to achieve the Act's legitimate purposes.¹⁹⁶ Currently available "user-based" software suggests that a reasonably effective method by which parents can prevent their children from accessing material will soon be widely available.¹⁹⁷ In the absence of any detailed congressional findings or even hearings addressing these special problems, the Court was persuaded that the CDA simply was not narrowly tailored.¹⁹⁸ Although much litigation will no doubt ensue regarding regulation of both these new industries, the Supreme Court has now set the ground rules, i.e., any government regulation will purportedly be subject to the same First Amendment scrutiny that has

189. *Id.*

190. *Id.* at 2342.

191. *Id.*

192. *Id.* at 2343.

193. *Id.* at 2349.

194. *Id.* at 2349-50.

195. *Id.* at 2346.

196. *Id.* at 2348.

197. *Id.*

198. *Id.*

traditionally been applied to the written press.

2. *Free Speech Rights of Government Employees*.—The United States Supreme Court has held that the government cannot condition employment upon relinquishing First Amendment rights.¹⁹⁹ However, it has also recognized that speech rights of government employees are not the same as those of the public at large.²⁰⁰ The Court has recognized the need to balance “the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs . . .”²⁰¹ In *Connick v. Myers*,²⁰² the Court refined the balancing test, clarifying that a court must make an initial inquiry as to whether the government employee’s speech is a matter of public concern, because “private” speech is entitled to little, if any, First Amendment protection. The Court provided little guidance as to how to make this initial determination, but it directed lower courts to examine the form, content, and context of the speech.²⁰³ The *Connick* Court also described speech upon matters of public concern as “relating to any matter of political, social, or other concern to the community.”²⁰⁴

In several cases state and federal courts took a fairly liberal approach in finding that the speech was at least partially of public concern; however, they then sustained sanctioning the speech under the *Connick/Pickering* balance. For example, in *City of Indianapolis v. Heath*,²⁰⁵ the court determined that a police officer’s comment in an interview with a local television station referring to Mayor Goldsmith as Mayor “Goldstein” addressed a matter of public concern. The merit board demoted the officer, alleging he had violated Indianapolis Police Department (IPD) rules and regulations by making anti-Semitic remarks about the mayor. Since the comment occurred at a public meeting in the midst of a discussion about the fiscal policies of the mayor, the court held that the speech indisputably addressed a matter of political concern to the community.²⁰⁶ Nonetheless, the speech was unprotected. Although the remark did not strain the officer’s working relationship with the chief, there was evidence that the words had a detrimental effect in the community, especially the Jewish community of Indianapolis. However, even if not intended as a religious slur, the comment reflected a lack of judgment on the officer’s part, in particular because he was

199. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

200. *United States v. National Treasury Employees Union*, 513 U.S. 454, 465-66 (1995); *see also* *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (the government’s interest in achieving its goals is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer).

201. *National Treasury Employees Union*, 513 U.S. at 465-66 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).

202. 461 U.S. 138 (1983).

203. *Id.* at 147.

204. *Id.* at 146.

205. 686 N.E.2d 940 (Ind. Ct. App. 1997).

206. *Id.* at 943.

speaking in uniform as a representative of the IPD.²⁰⁷

Similarly, in *Khuans v. School District 110*,²⁰⁸ the court found that even if some of a school psychologist's speech related to matters of public concern, i.e., that relating to a supervisor's noncompliance with the Individuals with Disability Education Act (IDEA),²⁰⁹ the speech was disruptive and the government's interest in providing services efficiently outweighed it. The court conceded that "bringing to light actual or potential wrongdoing during the provision of public services obviously is in the public's interest," and that "[g]overnment employees often are in the best position to know what ails the agencies for which they work."²¹⁰ However, it also found that "this tidbit of speech on a matter of public concern was only one of a bagful of complaints" that the employee made against her supervisor. Most of the comments were solely private employment matters, not whistleblowing regarding IDEA compliance; plaintiff was really just airing her conflict with her boss.²¹¹ The court concluded that Khuans' challenge to her supervisor in front of the principal and co-workers created a potential problem in maintaining authority and discipline within the department, and her own pleadings demonstrated the actual and potential disruption caused by her remarks.²¹² Although the government must make a more substantial showing before punishing speech that discloses actual wrongdoing or breach of public trust, the court concluded that the stronger showing was demonstrated in this case: "[t]o the extent [plaintiff's] speech encompassed one item of public concern, her interest in raising that matter as she did was outweighed by the disruption—actual and potential—that she caused."²¹³

Where the employee's speech as a whole more clearly goes beyond the kind of personal employee grievances that courts have found not to warrant First Amendment protection, the courts will hold the government to an even higher standard. For example, in *Hulbert v. Wilhelm*,²¹⁴ the court readily concluded that an employee who reported the Highway Department's open burning of potentially toxic materials to the Department of Natural Resources and who requested that corporation counsel investigate suspicious billing practices was engaged in speech of key public concern, even if the employee used internal

207. *Id.* at 945-46.

208. 123 F.3d 1010 (7th Cir. 1997).

209. 20 U.S.C. § 1400 (1994).

210. *Khuans*, 123 F.3d at 1016.

211. *Id.* at 1016-17.

212. *Id.* at 1017-18.

213. *Id.* at 1018; *see also* *Wales v. Board of Educ.*, 120 F.3d 82, 84-85 (7th Cir. 1997) (former schoolteacher who was not rehired after she advocated tougher discipline for students contrary to the learning philosophy of the education center failed to establish a viable First Amendment claim where the memorandum was closer to "private" than "public" speech addressing a subject that would have personal impact on her, and the school should have the right to insist that its staff support and carry out the educational philosophy espoused by the elected school board and principal).

214. 120 F.3d 648 (7th Cir. 1997).

memoranda and telephone calls to bring the problems to light.²¹⁵ Recognizing the significance of the speech, it rejected the county's effort to justify its action in the name of "maintaining harmonious relations between its employees."²¹⁶ Although the lower courts have frequently complained about the fuzziness of the *Pickering* balance,²¹⁷ courts will most likely find speech unprotected where an employee challenges a supervisor's management style, raising both the spectrum that the speech is more private in nature and that it will be more disruptive in the workplace. In contrast, where an employee speaks out more generally about wrongdoing or breach of public trust of a more serious nature, the speech will be found to be protected. Ironically, the more serious the charges the employee is making, the more disruptive the speech will be and, as the Seventh Circuit has noted, both the speaker and the employer may really have mixed motives for their actions, making the task "intractable."²¹⁸

D. Freedom of Religion

1. Aid to Religious Institutions.—Although textually the Establishment Clause of the First Amendment only prohibits Congress from establishing religion, this clause has long been interpreted as a mandate that government maintain a position of neutrality vis-a-vis religion. In *Lemon v. Kurtzman*,²¹⁹ the Court held that the Establishment Clause requires that government programs have a secular purpose, that their primary effect must neither advance nor inhibit religion, and that programs not create excessive entanglement between church and state.²²⁰ In recent years several Justices have vociferously argued that the *Lemon* test is too restrictive and that it should be replaced by a more "accommodationist" approach to church-state questions.²²¹ Some Justices have argued that the Establishment Clause is violated only where the government has endorsed or demonstrated approval of religion,²²² while others contend that the Establishment Clause bars only discrimination by government among religious organizations or coercive pressure by government to engage in religious activities.²²³

In *Agostini v. Felton*,²²⁴ although the Court again refused to formally overturn

215. *Id.* at 654.

216. *Id.*

217. *Wales*, 120 F.3d at 85 ("Open-ended balancing approaches of the sort announced in *Pickering* create unavoidable risks and costs for well-intentioned public employers As an inferior tribunal, our part is to apply the Supreme Court's approach, fuzzy though it may be.").

218. *Id.*

219. 403 U.S. 602 (1971).

220. *Id.* at 612-13.

221. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-98 (1993) (Scalia, J., concurring).

222. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

223. See *Lee v. Weisman*, 505 U.S. 577, 638-45 (1992) (Scalia, J., dissenting).

224. 117 S. Ct. 1997 (1997).

Lemon, it reversed two earlier Supreme Court opinions that applied *Lemon*, reasoning that the older decisions could not be squared with the Court's intervening Establishment Clause jurisprudence.²²⁵ In 1985, the Court ruled in *Aguilar v. Felton*²²⁶ that New York City's program under Title I of the 1965 Elementary and Secondary Education Act,²²⁷ which funds remedial instruction and counseling of disadvantaged children in public and private schools, created excessive church-state entanglement by requiring pervasive monitoring of instruction in parochial schools.²²⁸ The parties bound by that ruling asked the Court to revisit its decision, emphasizing the significant costs of complying with *Aguilar*, and recent assertions of five Justices that the case should be reconsidered.²²⁹ The Court agreed that later cases had undermined *Aguilar*. More specifically, it reasoned that *Aguilar* and its companion case, rested on four erroneous assumptions: (1) that a public school employee who works on religious school premises is presumed to inculcate religion in her work; (2) that the presence of public employees on private school premises creates an impermissible symbolic union between church and state; (3) that any public aid directly advancing the educational function of religious schools impermissibly finances religious doctrine; and (4) that the Title I program necessitated an excessive government entanglement with religion because public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion.²³⁰

Based on these premises, the Court in *Aguilar* had mandated that remedial services be provided only off-site, thus forcing the New York School Board to spend over \$100 million to lease mobile off-site instructional units and transport parochial school students to those sites.²³¹ These costs significantly reduced the amount of Title I money available for remedial education and required that many programs cut back on the number of students who received the benefits. A 1987 Senate Report estimated that the 1985 decision "resulted in a decline of about 35% in the number of private school children who are served."²³²

By a 5 to 4 vote, the Court in *Agostini* held that sending taxpayer-paid teachers into religious schools to help students with such subjects as math, science, and English does not violate the constitutionally required separation between church and state.²³³ Justice O'Connor reasoned that the Court's more recent cases have undermined the assumptions upon which *Aguilar* and its companion case relied. It is now accepted that placing full-time government employees on parochial school campuses does not, as a matter of law, have the

225. *Id.* at 2016.

226. 473 U.S. 402 (1985).

227. 20 U.S.C. § 2701 (1994).

228. *Aguilar*, 473 U.S. at 409.

229. *Agostini*, 117 S. Ct. at 2006.

230. *Id.* at 2010.

231. *Id.* at 2005.

232. *Id.* at 2005-06.

233. *Id.* at 2013.

impermissible effect of advancing religion.²³⁴ In *Zobrest v. Catalina Foothills School Dist.*,²³⁵ the Court upheld provision of a sign language translator for a deaf student attending Catholic school even though the translator would make religious statements in some translations. The Court reasoned that so long as the program has a wide scope and religious activities are only a small portion of the overall government program designed to help handicapped children, the government could not be found to have impermissibly endorsed religion.²³⁶ The Court in *Zobrest* thus abandoned the presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence always constitutes a symbolic union between government and religion.

Furthermore, *Zobrest* demonstrated that some forms of government aid that directly assist the educational function of religious schools are valid.²³⁷ The Court in *Agostini* emphasized that providing Title I assistance will not create a financial incentive to undertake religious education because the aid is allocated on the basis of neutral, secular criteria, that neither favor nor disfavor religion, and the aid is available to all beneficiaries on a non-discriminatory basis.²³⁸ Thus, the aid is less likely to have the effect of advancing religion.²³⁹ As to the Supreme Court's 1985 holding that New York City's Title I Program resulted in an excessive entanglement, this was based on the impermissible presumption that the program would require pervasive monitoring by public authorities to ensure that employees not inculcate religion: "Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required."²⁴⁰

Justice O'Connor found that New York City's Title I Program does not violate any of the criteria the Court currently uses to evaluate whether government aid has the effect of advancing religion: "[I]t does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."²⁴¹ Justice O'Connor concluded that this "carefully constrained program" cannot reasonably be viewed as an endorsement of religion.²⁴²

In dissent, four Justices argued that the Establishment Clause prohibits the state from subsidizing religion directly or from acting in any way that would reasonably be viewed as religious endorsement.²⁴³ The Court has followed this

234. *Id.*

235. 509 U.S. 1 (1993).

236. *Agostini*, 117 S. Ct. at 2012.

237. *Id.* at 2013.

238. *Id.* at 2014.

239. *Id.*

240. *Id.* at 2016.

241. *Id.*

242. *Id.*

243. *Id.* at 2019 (Souter, J., dissenting).

as an “unwavering rule” in Establishment Clause cases²⁴⁴ and *Zobrest* did not alter this rule since individual students were applicants for the benefits and not the school itself.²⁴⁵ The fact that Title I services are available to a broad group of beneficiaries is not a sufficient condition for an aid program to satisfy constitutional scrutiny.²⁴⁶

The immediate effect of *Agostini* is to eliminate the millions of dollars spent on noneducational costs required to comply with the 1985 decisions. Although not required to do so,²⁴⁷ school districts may now send public-salaried teachers into church-run schools to provide remedial educational services. It is unlikely, however, that the decision will affect other Establishment Clause rulings, such as the proscription of organized prayers in public schools. Since the 1960's, the Supreme Court has closely adhered to the principle that prayer in the public schools is prohibited by the Establishment Clause, regardless of whether students deliver the prayer, and regardless of whether the prayer ceremony is voluntary.²⁴⁸ As recently as 1992, the Court held that the Establishment Clause outlaws the practice of public schools inviting clergy to deliver non-sectarian prayers at graduation ceremonies. In *Lee v. Weisman*,²⁴⁹ Justice Kennedy found that graduation prayers “bore the imprint of the State and thus put school-age children who objected in an untenable position.”²⁵⁰ He emphasized the heightened concern with “protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”²⁵¹

In *Tanford v. Brand*,²⁵² the Seventh Circuit ruled that these concerns do not apply in a university setting. In *Tanford*, the court rejected claims made by an Indiana University law school professor and some of his students that the invocation and benediction delivered at Indiana University's commencement ceremonies violated the Establishment Clause. The court emphasized that “there was no coercion—real or otherwise—to participate” and that the special concerns

244. *Id.* at 2020.

245. *Id.* at 2024.

246. *Id.* at 2025.

247. K.R. by M.R. v. Anderson Community Sch. Corp., 125 F.3d 1017, 1019 (7th Cir. 1997) (the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1491o (1994), does not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students; school board's decision to provide speech therapy, occupational therapy and physical therapy at a public school site while the plaintiff attended parochial school satisfied the statutory obligation and neither infringed on K.R.'s right to fully exercise her religious choice nor convey any message of governmental endorsement or disapproval of K.R.'s religion).

248. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (invalidating the practice of having students read passages from the Bible); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (striking down voluntary prayer).

249. 505 U.S. 577 (1992).

250. *Id.* at 590.

251. *Id.* at 592.

252. 104 F.3d 982 (7th Cir.), *cert. denied*, 118 S. Ct. 60 (1997).

underlying the Court's decision in *Lee* were entirely absent.²⁵³ The court reasoned that "peer pressure is unlikely to dissuade collage graduates from protesting . . . thousands of graduates chose not to attend the stadium morning ceremony and that non-adherents could dissent without being noticed."²⁵⁴ Further, the fact that the practice of invocation and benediction was 155 years old and was widespread throughout the nation suggested that this was simply an acknowledgement that such prayers solemnize public occasions, rather than an endorsement of any particular religious beliefs.²⁵⁵ The benediction did not have the primary effect of endorsing or disapproving religion, nor did it cause excessive entanglement between church and state simply because the university selected the cleric and instructed the cleric that the remarks should be "unifying and uplifting."²⁵⁶ Any entanglement was "*de minimis* at best."²⁵⁷

In contrast to the university setting, the special concern with religious indoctrination at the elementary and second school levels played a significant role in *Helland v. South Bend Community School Corp.*²⁵⁸ The court upheld Helland's removal from a list of those eligible for substitute teaching positions in part because he interjected religious-oriented materials in the classroom—proselytizing by reading the Bible aloud, distributing biblical pamphlets, and professing his belief in the biblical version of creation.²⁵⁹ Helland argued he was unlawfully dismissed because of his religious beliefs contrary to Title VII of the Civil Rights Act of 1964,²⁶⁰ which bars religious discrimination in employment, and the Religious Freedom Restoration Act, discussed in the next section.²⁶¹ Applying the general principle that a school can direct a teacher to refrain from expressions of religious viewpoints in the classroom, the court held that the school corporation in fact has a compelling interest to ensure that subsidized teachers do not inculcate religion: "the Constitution requires governmental agencies to see that state-supported activity is not used for religious indoctrination. . . . [T]olerating Helland's behavior would have opened up another constitutional can of worms."²⁶²

Although the expression of public school teachers may be restricted, another Seventh Circuit case demonstrates that students' speech cannot be suppressed or discriminated against solely because of its religious content. In *Muller by Muller v. Jefferson Lighthouse School*,²⁶³ the trial court issued an injunction requiring that the school allow fourth-grader Andrew Muller to hand out during school

253. *Id.* at 985.

254. *Id.*

255. *Id.*

256. *Id.* at 986.

257. *Id.*

258. 93 F.3d 327 (7th Cir. 1996).

259. *Id.* at 329.

260. 42 U.S.C. § 2000 (1994).

261. See *infra* notes 272-91 and accompanying text.

262. *Helland*, 93 F.3d at 331.

263. 98 F.3d 1530 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1335 (1997).

invitations to a religious meeting to be held at his church.²⁶⁴ On appeal, the Seventh Circuit agreed with the plaintiffs that any attempt to justify the restriction on speech as necessary to prevent entanglement with religion was specious: “The Supreme Court has . . . rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech.”²⁶⁵ Although educators may restrict speech if such is contrary to the educational mission or is disruptive or injurious to the rights of other students, it may not single out students’ speech solely because it is religious.²⁶⁶

Outside the school context, the Seventh Circuit addressed the somewhat unique Establishment Clause claims brought by a government employee against her boss. In *Venters v. Delphi*,²⁶⁷ the plaintiff argued that the Establishment Clause is violated where a supervisor coerces an employee to submit to “religious dialogues by means of intimidation.”²⁶⁸ The employee, a radio dispatcher, alleged that the police chief had “virtually from his first day in office pressured her to bring her thinking and her conduct into conformity with the principles of his own religious beliefs”²⁶⁹ Eight months later, the employee was dismissed for alleged performance deficiencies. The Seventh Circuit reversed a summary judgment ruling in favor of the employer, concluding that the chief’s conduct would violate the Establishment Clause even if he ultimately fired the plaintiff for legitimate reasons.²⁷⁰ The court also reasoned that the Free Exercise Clause shielded the employee from “being compelled to submit herself to the religious scrutiny of her superior,” even if she could not show how she was injured in the exercise of her own religious beliefs.²⁷¹

2. *Free Exercise of Religion*.—The most important development regarding the free exercise of religion was the Supreme Court’s invalidation of the Religious Freedom Restoration Act (RFRA).²⁷² Congress enacted this law in 1993 in direct response to the Supreme Court’s decision in *Employment Division v. Smith*,²⁷³ which held that a state may enforce laws of general applicability even where such laws infringe upon the free exercise of religion provided such laws

264. *Id.* at 1534.

265. *Id.* at 1543-44.

266. *Id.* Cf. *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1299 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997) (county building authority’s enactment of content-neutral regulation which barred all private displays in lobby of county building was reasonable in light of the purposes of the building lobby and did not violate the First Amendment rights of the Lubavitch even if such was passed in response to their request to display a five-foot high, wooden Menorah as they had been permitted to do in previous years).

267. 123 F.3d 956 (7th Cir. 1997).

268. *Id.* at 970.

269. *Id.*

270. *Id.*

271. *Id.* at 971.

272. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994)).

273. 494 U.S. 872 (1990).

are rational.²⁷⁴ In *Smith*, the Court rejected the claim by members of the Native American Church that their free exercise right was unconstitutionally burdened by an Oregon statute that criminalized the use of the hallucinogenic drug peyote, which is ingested sacramentally.²⁷⁵ Prior to *Smith*, laws which substantially burdened religious freedom were subject to a much stricter analysis: states had to show an overriding interest that would be significantly impaired by granting religious exemption.²⁷⁶ To restore this analysis, RFRA prohibited government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates that the burden furthers a compelling interest and is the least restrictive means of furthering that interest.²⁷⁷

In *City of Boerne v. Flores*,²⁷⁸ the Court ruled 6 to 3 that Congress cannot assert its own definition of constitutional liberties or make substantive changes in constitutional protections. The Court acknowledged both that Section 5 of the Fourteenth Amendment gives Congress the power "to enforce, by appropriate legislation, the provisions of this article," and that laws which deter or remedy constitutional violations fall within this enforcement power even if Congress prohibits conduct which is not itself unconstitutional.²⁷⁹ However, the Court also admonished Congress that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."²⁸⁰ The Court drew a distinction between the power to enforce, which is generally described as "remedial," and the power to determine what constitutes a constitutional violation. While conceding that the line between remedying and making substantive changes is "not easy to discern," the judiciary must look to the "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" in order to determine whether Congress has exceeded its power.²⁸¹

274. *Id.* at 879; *see also* *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543-44 (7th Cir. 1996) (although speech cannot be suppressed or discriminated against solely because it is religious, provision of school district's code which governed distribution of non-school sponsored material by public elementary students did not implicate the Establishment Clause since the regulations applied to religious and non-religious distributions alike); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997) (county regulation that barred all private displays in lobby of county building which was non-public forum was permitted even if enacted in response to religious group's injunction against enforcement of prior regulation since motive is irrelevant for purposes of First Amendment analysis provided government enacts a content-neutral rule).

275. *Smith*, 494 U.S. at 877-78.

276. *See generally* *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

277. 42 U.S.C. § 2000bb-1 (1994).

278. 117 S. Ct. 2157 (1997).

279. *Id.* at 2165.

280. *Id.* at 2164.

281. *Id.*

Applying this standard, the Court held that RFRA was not a proper exercise of Congress' remedial or preventive power. First, RFRA's legislative record did not show any recent history of laws of general application "passed because of religious bigotry."²⁸² Further, RFRA was so out of proportion to a supposed remedial or preventive object that it could not be understood as responsive to any unconstitutional behavior: it had no termination date; it imposed a strict compelling interest/least restrictive means test, which was a considerable congressional intrusion into the states' traditional authority to regulate for the health and safety of their citizens; and the statute's "least restrictive means" requirement was not even imposed under pre-*Smith* jurisprudence that RFRA purportedly codified.²⁸³

Justice O'Connor, in dissent, did not challenge the Court's exposition on congressional power. Rather, she argued that *Smith* was wrongly decided and that the parties should have been asked to brief the question of whether *Smith* should be overturned.²⁸⁴ Justices Souter and Breyer joined O'Connor in suggesting that *Smith* was wrongly decided and should be re-examined.²⁸⁵

The thrust of the majority's opinion is, in essence, a reaffirmation of the Supreme Court's 1803 holding that it is "the province and duty of the judicial department to say what the law is."²⁸⁶ Congress in enacting RFRA specifically stated that it did so because the Court had misconstrued the First Amendment's guarantee of the free exercise of religion. If Congress could make a substantive change in constitutional protections, the Constitution would no longer be "'superior paramount law, unchangeable by ordinary means,'" instead, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."²⁸⁷

The most immediate impact of the Court's ruling is to alter the analysis in literally hundreds of cases, many of which have been brought by prison inmates raising RFRA challenges to dress and grooming requirements and demanding their religious-based right to dietary and other accommodations. For example, in *Craddick v. Duckworth*,²⁸⁸ a Native American inmate challenged a state prison regulation prohibiting him from wearing a medicine bag. The court ruled that the regulation violated RFRA because the state could not demonstrate a compelling interest or that the denial was the least restrictive means of furthering its interest in enhanced prison security since there was no showing that medicine bags posed a genuine threat to prison security.²⁸⁹ Although even under RFRA the majority

282. *Id.* at 2169.

283. *Id.* at 2169-71.

284. *Id.* at 2176 (O'Connor, J., dissenting).

285. *Id.* at 2185-86 (Souter, Breyer, JJ., dissenting).

286. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court refers to *Marbury* to support its holding, 117 S. Ct. at 2172.

287. *City of Boerne*, 117 S. Ct. at 2168 (citing *Marbury*, 5 U.S. at 177).

288. 113 F.3d 83 (7th Cir. 1997).

289. *Id.* at 85; *see also* *Sasnett v. Sullivan*, 91 F.3d 1018, 1023 (7th Cir. 1996), *cert. granted*,

of these claims were rejected due to overriding prison security concerns,²⁹⁰ now that RFRA has been invalidated, prison officials can readily meet the rational basis analysis imposed under *Smith*. Facially neutral, generally applicable dress codes and grooming requirements will likely be found to serve the legitimate government interest in prison security.²⁹¹

117 S. Ct. 2502 (1997) (judgment vacated and remanded for reconsideration in light of *Boerne v. Flores*, 117 S. Ct. 2157 (1997)) (once a prisoner has shown a substantial burden, the burden of justification is on the state; prison failed to justify flat ban on wearing jewelry as applied to religious crucifixes). Cf. *Harless by Harless v. Darr*, 937 F. Supp. 1339, 1347 (S.D. Ind. 1996) (school policy on distribution of materials did not substantially burden first grade students' free exercise of religion in violation of RFRA, and thus heightened scrutiny was not triggered).

290. *O'Leary v. Mack*, 80 F.3d 1175, 1180 (7th Cir. 1996), *cert. granted*, 118 S. Ct. 36 (1997) (judgment vacated in light of *Boerne*) (under RFRA prison officials do not have to do "handsprings" to accommodate religious needs of inmates, and prison officials had compelling interest in maintaining prison order that justified their denial of prisoner's request to hold banquet to celebrate birthday of their founder in view of evidence that there were approximately 300 different religious sects at the prison and that communal eating was a standard rite for many of those sects).

291. Note that even before *Smith*, the Supreme Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), had ruled that state prison policies need only be reasonably related to legitimate penological objectives to override free exercise claims brought by inmates. Without RFRA, *O'Lone* again becomes the standard.

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This Article will focus on recent case development regarding criminal law and procedure which have been addressed by the Indiana appellate courts since the last Survey and will discuss statutes enacted and modified by the 1997 Indiana General Assembly.

I. 1997 INDIANA LEGISLATIVE ACTS

A. The Effects of Battery and the Intoxication Defenses

The Indiana legislature created several statutes in an effort to affect the ability of counsel representing defendants from raising specialized defenses of self defense under circumstances more commonly referred to as the “battered woman’s syndrome” and intoxication.

The legislature defined the “effects of battery” as referring to “a psychological condition of an individual who has suffered repeated physical or sexual abuse inflicted by another individual who is the . . . victim of an alleged crime for which the abused individual is charged in a pending prosecution.”¹ Additionally, the victim must be the abused individual’s spouse or former spouse,² parent,³ guardian or former guardian,⁴ custodian or former custodian,⁵ or cohabitant or former cohabitant.⁶

The legislature then set out the procedural requirements for the instances “when the defendant in a prosecution raises the issue that the defendant was at the time of the alleged crime suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime.”⁷ A defendant can raise the issue in one of two ways. First, a defendant could claim that as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the crime at the time of the alleged offense.⁸ This is the traditional “insanity” defense as described in section 35-41-3-6 of the

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1. IND. CODE § 35-41-1-3.3 (Supp. 1997).
2. *Id.* § 35-41-1-3.3(2)(A).
3. *Id.* § 35-41-1-3.3(2)(B).
4. *Id.* § 35-41-1-3.3(2)(C).
5. *Id.* § 35-41-1-3.3(2)(D).
6. *Id.* § 35-41-1-3.3(2)(E).
7. *Id.* § 35-41-3-11(6).
8. *Id.* § 35-41-3-11(b)(1).

Indiana Code. Second, a defendant could claim to have used justifiable reasonable force under Indiana's self defense statute.⁹ If a defendant claims this, then he has the burden of producing evidence of that defense.¹⁰ To establish the defense, a trier of fact must "find support for the reasonableness of the defendant's belief in the imminence of the use of unlawful force or, when deadly force is employed, the imminence of serious bodily injury to the defendant or a third person or the commission of a forcible felony."¹¹ The introduction of any expert testimony under this section is to be admitted in accordance with the Indiana Rules of Evidence.¹² This leaves open the issue of whether expert testimony should be considered by the trier of fact or the court.

If a defendant wants to raise the "effects of battery" as a defense, then he or she must file a written motion of that intent with the trial court not later than twenty days before the omnibus date if the defendant is charged with a felony¹³ or ten days if the defendant is charged only with one or more misdemeanors.¹⁴ "In the interest of justice and upon a showing of good cause, the court may permit the filing to be made at any time before the commencement of the trial."¹⁵

At the same time the legislature narrowed the ability of defendants to use the "effects of battery" as a defense, it created a new statutory mitigating circumstance for sentencing that involves the "effects of battery." This new mitigator occurs when the defendant's crime involves "the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted."¹⁶

The legislature also enacted a law which states that "intoxication is *not* a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of IC 35-41-3-5 [the newly revised intoxication statute]."¹⁷ That statute says that "[i]t is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body: (1) without his consent; or (2) when he did not know that the substance might cause intoxication."¹⁸

It would appear on its face that these statutes are inconsistent to the extent that section 35-41-3-5 is phrased as a positive while section 35-41-2-5 is

9. *Id.* § 35-41-3-11(b)(2).

10. *Id.*

11. *Id.*

12. *Id.* § 35-41-3-11(d).

13. *Id.* § 35-41-3-11(c)(1).

14. *Id.* § 35-41-3-11(c)(2).

15. *Id.* § 35-41-3-11(c).

16. *Id.* § 35-38-1-7.1(c)(11).

17. *Id.* § 35-41-2-5 (emphasis added).

18. *Id.* § 35-41-3-5 (emphasis added).

expressed in the negative. Reading the two statutes together, however, it is clear that the legislature meant to remove voluntary intoxication as a defense to criminal conduct while at the same time remaining consistent with the Indiana case *Terry v. State*,¹⁹ and the recent U.S. Supreme Court case, *Montana v. Egeloff*.²⁰ The practical effect of this change appears to be that, in the appropriate cases, the State will now be entitled to a final instruction that it was not entitled to prior to the statute. This author would suggest that an appropriate instruction might read:

You are instructed that voluntary intoxication is not a defense in a prosecution for an offense and intoxication may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the intoxication resulted from the introduction of a substance into the defendant's body without his consent or when he did not know the substance might cause intoxication.

Time will tell whether the appellate courts in Indiana will accept the limiting nature of the legislature's modification of this defense.

B. Enhancements to Previous Statutes

In 1997, the legislature passed several statutes which enhance already existing offenses. Battery has been enhanced to a class A misdemeanor if it is committed against the employee of a penal facility or juvenile detention facility²¹ and to a class D felony if it results in bodily injury to an employee of a penal facility or juvenile detention facility.²² In addition, a battery related to domestic violence is now a class D felony if it results in bodily injury to another person, if the person who commits battery has a previous conviction which is also related to "domestic violence."²³ "Domestic violence" includes "conduct found by a court to be physical or sexual abuse against a party or child of a party, including conduct that is an element of an offense under IC 35-42, regardless of whether the conduct results in a criminal prosecution or occurs in the presence of a child

19. 465 N.E.2d 1085 (Ind. 1984) (holding a statute attempting to remove the factor of voluntary intoxication, void except in limited circumstances, because it went against the principle that "[a]ny factor which serves as a denial of the existence of mens rea must be considered by a trier of fact before a guilty finding is entered.").

20. 518 U.S. 37 (1996) (holding the defendant's right to have the jury consider evidence of voluntary intoxication was not a "fundamental principle of justice," and Montana's statutory ban on consideration of such evidence does not violate the due process clause).

21. IND. CODE § 35-42-2-1(a)(1)(C) (Supp. 1997). To be a class A misdemeanor, the offense must be committed against the employee while the employee is "engaged in the execution of [his] official duty." *Id.*

22. *Id.* § 35-42-2-1(a)(2)(K). Again, to be a class D felony, the offense must be committed against the employee while the employee is "engaged in the execution of [his] official duty." *Id.*

23. *Id.* § 35-42-2-1(a)(2)(E).

of the parties.”²⁴ The term does not include negligence or defamation by one parent against the other parent or the child, or reasonable acts of self defense used to protect a parent or child from the conduct of the other parent.²⁵

Sentencing statutes received some attention from the 1997 legislature. Causing a death while operating a motor vehicle while intoxicated under section 9-30-5-5 of the Indiana Code was added to the list of “crimes of violence”²⁶ for which sentences may be ordered served consecutively without the limitation that the aggregate sentence not exceed the presumptive sentence for the next higher grade of felony.²⁷ In addition, the crime of aggravated battery (section 35-42-2-1.5 of the Indiana Code) was added to the list of “nonsuspendible” offenses for which the minimum sentence must be executed.²⁸

Criminal mischief was increased to a class D felony when the property damaged is a “law enforcement animal.”²⁹ A law enforcement animal is an animal “owned or used by a law enforcement agency for the principal purposes of aiding in the detection of criminal activity, the enforcement of laws, and the apprehension of offenders, and insuring the public welfare.”³⁰ In addition, it is now a class A misdemeanor for anyone who knowingly or intentionally “(1) strikes, torments, injures, or otherwise mistreats a law enforcement animal; or (2) interferes with the actions of a law enforcement animal while the animal is engaged in assisting a law enforcement officer in the performance of the officer’s duties. . . .”³¹ The new law provides that “[i]t is a defense that the accused person: (1) engaged in a reasonable act of training, handling, or discipline; and (2) acted as an employee or agent of a law enforcement agency.”³² In addition to any sentence or fine imposed by the court, those who violate this statute may also be ordered to make restitution through reimbursement of veterinary bills and replacement costs of the animal if the animal is disabled or killed.³³

C. Sex Offenses and the Sex Offender Registry

The legislature continued to tinker with sex-related offenses when it expanded the voyeurism statute to reach beyond “peeping” into an occupied dwelling of another person³⁴ to include peeping without the other person’s consent “into an area where an occupant of the area reasonably can be expected

24. *Id.* § 31-9-2-42.

25. *Id.*

26. *Id.* § 35-50-1-2(a)(12).

27. *Id.* § 35-50-1-2(c)(1).

28. *Id.* § 35-50-2-2(b)(4)(R).

29. *Id.* § 35-43-1-2(a)(2)(B)(v).

30. *Id.* § 35-46-3-4.5(a).

31. *Id.* § 35-46-3-11(a).

32. *Id.* § 35-46-3-11(b).

33. *Id.* § 35-46-3-11(c).

34. *Id.* § 35-45-4-5(a)(1).

to disrobe”³⁵ which includes restrooms,³⁶ baths,³⁷ showers,³⁸ and dressing rooms.³⁹

Public indecency is now a class D felony “if the person commits the offense by appearing in the state of nudity with the intent to arouse the sexual desires of the person or another person in or on a public place where a child less than sixteen (16) years of age is present.”⁴⁰

The State’s sex offense registry was changed by adding a list of the sex crimes for which a person must be listed on the state sex offender registry, which is maintained by the Indiana Criminal Justice Institute. The legislature removed the limitation of listing rape, criminal deviate conduct, incest, and sexual battery only when the victim was under eighteen. These crimes are now listed regardless of the victim’s age.⁴¹ The amendment also makes it clear that the registry is to include anyone convicted of an offense specified in the statute without regard to the date of the crime or conviction.⁴²

D. Abortion

The 1997 legislature criminalized partial-birth abortion. “Partial birth abortion” is “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.”⁴³ The amendment to Indiana’s abortion law provides that “a person may not knowingly or intentionally perform a partial birth abortion unless a physician reasonably believes that: (1) performing the partial birth abortion is necessary to save the mother’s life; and (2) no other medical procedure is sufficient to save the mother’s life.”⁴⁴ The legislature excused patients from criminal liability when it added language which states “a woman upon whom a partial birth abortion is performed may not be prosecuted for violating or conspiring to violate [the new partial birth abortion prohibition].”⁴⁵

E. Operating While Intoxicated

The legislature made a significant change in the definition for *prima facie* evidence of intoxication and for liability under intoxicated driving laws when it amended the operating while intoxicated statute. The statute now reads that:

35. *Id.* § 35-45-4-5(a)(2).

36. *Id.* § 35-45-4-5(a)(2)(A).

37. *Id.* § 35-45-4-5(a)(2)(B).

38. *Id.* § 35-45-4-5(a)(2)(C).

39. *Id.* § 35-45-4-5(a)(2)(D).

40. *Id.* § 35-45-4-1(a).

41. *Id.* § 5-2-6-3(b)(1)(A),(B),(I),(J).

42. *Id.* § 5-2-6-3(b).

43. *Id.* § 16-18-2-267.5.

44. *Id.* § 16-34-2-1(b).

45. *Id.* § 16-34-2-7(d).

(a) A person who operates a vehicle with at least ten-hundredths percent (0.10%) of alcohol *by weight in grams* in:

- (1) *one hundred (100) milliliters* of the person's blood; or
- (2) *two hundred ten (210) liters* of the person's breath;

commits a Class C misdemeanor.

(b) A person who operates a vehicle with a controlled substance listed in schedule I or II of IC 35-48-2 *or its metabolite* in the person's *body* commits a Class C misdemeanor.⁴⁶

These changes were made as a result of several cases, including *Godar v. State*⁴⁷ and *Estes v. State*.⁴⁸ In those cases, the appellate courts found that, as a matter of law, evidence is insufficient to support a conviction for operating vehicle while intoxicated with at least .10% by weight of alcohol in blood where there is no evidence in the record showing that the breath test equipment measured blood alcohol content by weight.⁴⁹ In *Estes*, a positive urine test for marijuana at the time of arrest was insufficient to prove that the defendant had marijuana in his blood, and did not support the defendant's conviction for operating a vehicle with a controlled substance in his blood.⁵⁰

This definitional change was also made in the statutes covering operation of a vehicle while intoxicated causing serious bodily injury⁵¹ and operating a vehicle causing death.⁵² In addition, several other provisions of section 9-13 of the Indiana Code were changed, including: *prima facie* evidence of intoxication;⁵³ relevant evidence of intoxication;⁵⁴ driving under the influence by persons under 21 years of age;⁵⁵ chemical tests admissible as evidence of blood alcohol content;⁵⁶ open container infractions;⁵⁷ *prima facie* evidence of intoxication for motorboat violations;⁵⁸ relevant evidence for motorboat operation;⁵⁹ and operation of a motorboat while intoxicated.⁶⁰

It is interesting to note that the change from "controlled substance in the blood" to "controlled substance . . . or its metabolite in the *body*"⁶¹ was not made

46. *Id.* § 9-30-5-1 (emphasis added).

47. 643 N.E.2d 12 (Ind. Ct. App. 1994).

48. 656 N.E.2d 528 (Ind. Ct. App. 1995).

49. *Godar*, 643 N.E.2d at 14.

50. *Estes*, 656 N.E.2d at 529.

51. IND. CODE § 9-30-5-4 (Supp. 1997).

52. *Id.* § 9-30-5-5.

53. *Id.* § 9-13-2-131.

54. *Id.* § 9-13-2-151.

55. *Id.* § 9-30-5-8.5.

56. *Id.* § 9-30-6-15.

57. *Id.* § 9-30-15-3.

58. *Id.* § 14-15-8-5.

59. *Id.* § 14-15-8-6.

60. *Id.* § 14-15-8-8.

61. *Id.* § 9-30-5-1 (emphasis added).

in the operating a vehicle causing a death statute. Thus, the statute still provides liability for causing a death by operating a vehicle "with a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in the person's *blood*."⁶²

The change in the intoxicated driving statutes also necessitated a change in the habitual offender statute. The legislature altered the statute by providing that habitual violator status includes violations under the old formulation, "alcohol in the blood," *before July 1, 1997*, as well as violations under the new statute, which calls for a percent of "alcohol by weight in grams in: (A) one hundred (100) milliliters of the blood; or (B) two hundred ten (210) liters of the breath" *after June 30, 1997*.⁶³

F. Community Corrections

Community Corrections continues to be an area capturing the legislature's attention as a result of increased jail and prison populations throughout the state. The scope of community corrections programs was modified to include "[p]ersons ordered to participate in community corrections programs as a condition of probation."⁶⁴ In addition, day reporting programs were added to the list of types of community corrections programs that can be provided.⁶⁵ Under new legislation, the Department of Corrections is now responsible for providing an approved training curriculum for community corrections field officers.⁶⁶ Finally, the D felony alternative to a full presentence report for those D felons committed to the Department of Corrections is now required when a D felon is sentenced to a community corrections program as a direct placement for those given non-suspendible sentences.⁶⁷

II. CASE DEVELOPMENTS

A. Search and Seizure

The Indiana Supreme Court examined the application of the "good faith" exception to the exclusionary rule in *Figert v. State*.⁶⁸ Based upon information contained in an affidavit for probable cause, the trial court issued a search warrant for "the three residences at 20831 Upas Road" to look for cocaine and "any and all property related to narcotics trafficking" in the homes and in the "vehicles within the curtilage."⁶⁹ The warrant was sought as part of an undercover investigation where controlled purchases of cocaine were made from men conducting drug sales from two of the three manufactured homes. The

62. *Id.* § 9-30-5-5(a)(2) (emphasis added).

63. *Id.* § 9-30-10-4(a)(5)-(6),(b)(2)-(3).

64. *Id.* § 11-12-1-2(4).

65. *Id.* § 11-12-1-2.5(a)(9).

66. *Id.* § 11-12-2-5(a)(10).

67. *Id.* §§ 35-38-2.6-1, -2, -6.

68. 686 N.E.2d 827 (Ind. 1997).

69. *Id.* at 829 (quoting the police officer's probable cause affidavit).

homes were in a "U" shape, and Figert and a co-defendant named Green lived in the third home. The probable cause affidavit did not allege that any drug sales were observed from the third home or that it was a base of operations for drug trafficking or that Figert or Green sold drugs. The only detail in the affidavit regarding the third home, Figert, or Green was that "there were currently a large number of unidentified individuals living and frequenting the three trailers."⁷⁰ The search of the home uncovered incriminating evidence against Figert and Green as well as the discovery of evidence in Green's car. They were charged and presented an interlocutory appeal of the denial of their motion to suppress by means of certified questions.⁷¹ The questions were:

(1) "Whether the finding of probable cause for the issuance of a search warrant for all dwellings on the premises . . . was proper when the information used to formulate probable cause and the issuance of a search warrant was based on the activities of two residences that did not involve the [defendants'] residence;" and (2) "Whether the Court's finding that 'the totality of the circumstances makes the entire premises suspect' and thus '[a] substantial basis existed for a finding of probable cause to search all dwellings located at the farm' was correct."⁷²

The court of appeals, in a 2-1 decision, found that there was no probable cause for the issuance of the warrant, but the majority determined that the "good faith" exception applied and affirmed the trial court.⁷³ Judge Staton agreed with the majority that there was no probable cause but dissented on the issue of the "good faith" exception.⁷⁴

On appeal to the Indiana Supreme Court, the first issue was whether the information contained in the affidavit supported the finding of no probable cause. The reviewing court must determine whether the magistrate had a "substantial basis" to make a finding of probable cause.⁷⁵ In making that decision, the supreme court maintained the principle that "a search of multiple units at a single address must be supported by probable cause to search each unit and is no different from a search of two or more separate houses."⁷⁶ Here, the supreme court agreed with the court of appeals that probable cause did not exist to support the search:

"[T]he reasonable inferences drawn from the totality of the evidence," at most show that drugs were being sold from the first two homes by persons who lived in those homes or used them as a base of operations for drug trafficking. "Unidentified individuals," who may or may not

70. *Id.* (quoting the police officer's probable cause affidavit).

71. *Id.*

72. *Id.*

73. *Figert v. State*, 683 N.E.2d 1314, 1320-21 (Ind. Ct. App. 1997).

74. *Id.* at 1321-22.

75. *Figert*, 686 N.E.2d at 830.

76. *Id.*

have been involved in the drug sales, were “frequenting the three trailers.” This all occurred in the general vicinity of the three homes, but does not support the conclusion that the third home or Figert and Green were necessarily involved. In short, the probable cause affidavit does not allege facts that would establish a fair probability that evidence of crime would be found in Figert’s and Green’s home.⁷⁷

The court rejected the State’s argument that this was a “collective dwelling” which might allow an exception, because there was insufficient showing of collective control or occupation.⁷⁸ The court stated:

The probable cause affidavit alleged that different persons lived in the first two homes and that the officer bought drugs from both occupants on separate occasions. The affidavit did not allege any connection between any of the controlled drug buys and the third home. Significantly, an effort was made to conceal the illegal activities from some of the occupants of the first two homes. Thus, the facts cut against the view that the Farm was a collective drug-dealing operation and indicate that some of the occupants may not have been aware of illegal activity. If the officer who sought the warrant had information tending to show involvement by the third home in the drug sales, that information should have been offered when the warrant was issued.⁷⁹

The court said that warrants, as used in this case, to search three separate residences occupied by three different people should be viewed with disfavor and the better practice would be to seek separate warrants for each residence.⁸⁰

Having found that probable cause did not exist for the search, the court then examined the court of appeals’ decision that the search was permissible under a “good faith” exception. The court reviewed the rule as set out in *United States v. Leon*,⁸¹ which says that when the police rely in objective good faith on a warrant later found to be defective, the Fourth Amendment does not require exclusion of the seized evidence.⁸² But where the warrant is “based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,’” exclusion is the appropriate remedy.⁸³

The issue is whether the officer’s reliance on the warrant is objectively reasonable notwithstanding the issuance of the warrant by a magistrate.⁸⁴ “The good faith exception necessarily assumes that police reliance on a warrant can

77. *Id.* (citation omitted).

78. *Id.* at 830-31.

79. *Id.* at 831.

80. *Id.*

81. 468 U.S. 897 (1984).

82. *Figert*, 686 N.E.2d at 831. This is because “suppression would not further the exclusionary rule’s objective of deterring police misconduct” *Id.*

83. *Id.* (quoting *Leon*, 468 U.S. at 923).

84. *Id.* at 832.

be objectively reasonable despite the lack of probable cause,”⁸⁵ and yet the good faith exception cannot be “so broadly construed as to obliterate the exclusionary rule.”⁸⁶

The court of appeals found that “the officers executing the warrant . . . could reasonably believe that probable cause to search a conclave consisting of the three trailers and accumulated junk cars located at a particular address had been established through the indicia presented by [the officer’s] personal experiences and observations.”⁸⁷ The supreme court disagreed and stated:

Probable cause clearly existed with respect to the first two homes, and the totality of the circumstances established some suspicion or possibility of a joint drug-dealing enterprise at the Farm. But this is not enough. The affidavit did not allege any facts linking the third home to the surrounding criminal activity. The lack of any nexus is a critical point in assessing the reasonableness of the officer’s reliance on the warrant.⁸⁸

The court determined that the police officer should have been aware that there are specific legislative requirements for the form and content of probable cause affidavits and that compliance with the most basic of these statutes has “bred familiarity with so basic a requirement as a particularized showing of probable cause.”⁸⁹ Here, there was no technically flawed hearsay in the affidavit that linked Figert’s and Green’s home to the drug-dealing that would make reliance on the warrant objectively reasonable.⁹⁰

In *United States v. Leon*, the Court noted that the rationale for the good faith exception is designed to “deter police misconduct rather than to punish the errors of judges and magistrates.”⁹¹ The affidavit in *Figert*, however, contained nothing but conclusory statements that the officer had probable cause and was therefore insufficient as a matter of law to authorize a search.⁹² The court further said that “[i]f probable cause could be so easily imputed from one dwelling to another through overbroad application of the Leon exception, nothing would prevent searches of residences merely because of the fortuity of their proximity to illegal conduct. This would reduce the Fourth Amendment to an ‘empty promise.’”⁹³ The court remanded the case and ordered the trial court to grant Figert’s motion to suppress in its entirety and Green’s motion to suppress regarding the search of the home.⁹⁴

85. *Id.*

86. *Id.* (quoting *Dolliver v. State*, 598 N.E.2d 525, 529 (Ind. 1992)).

87. *Id.* (quoting *Figert v. State*, 683 N.E.2d 1314, 1320-21 (Ind. Ct. App. 1997)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 833 (quoting *United States v. Leon*, 468 U.S. 897, 916 (1984)).

92. *Id.*

93. *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643, 660 (1961)).

94. *Id.*

In another recent case, *Lloyd v. State*, the Indiana Court of Appeals dealt with a challenge to the validity of a search.⁹⁵ In that case, a Morgan County magistrate issued a search warrant based upon information provided by a deputy sheriff. Lloyd was subsequently charged with two class D felonies as a result of the search, and he appealed the trial court's denial of his motion to suppress.⁹⁶

The first challenge to the validity of the search claimed that the deputy sheriff failed to establish probable cause as required by the Indiana and U.S. Constitution, because the information in the warrant was based largely on the hearsay statement of a third person, Virginia Buckley.⁹⁷ The deputy attempted undercover drug purchases from Buckley over a period of two weeks. During the first attempt, the deputy saw Buckley enter Lloyd's Bloomington apartment for the purpose of buying the drugs. This attempt was unsuccessful, but approximately ten days later, Buckley sold marijuana to the deputy and claimed she could get more from "her source in Bloomington."⁹⁸

Judge Baker, writing for the majority, reviewed the standard for issuing a search warrant and stated that, as long as the magistrate had a substantial basis for concluding that probable cause existed, the magistrate's decision would be affirmed.⁹⁹ The court continued that both the Indiana legislature and the Supreme Court have set out requirements for when hearsay may be used to establish probable cause.¹⁰⁰

Indiana has set out by statute its requirement that an affiant who is attempting to establish probable cause based on hearsay must show that his sworn testimony or affidavit: "'(1) contain[s] reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or (2) contain[s] information that establishes that the totality of the circumstances corroborates the hearsay.'"¹⁰¹ The federal standard was set out in *Illinois v. Gates*, which allows hearsay in determining probable cause if the totality of the circumstances corroborates the hearsay.¹⁰² Since the deputy did not comply with the Indiana statute by showing that Buckley was credible, that her information was reliable, or that he (the deputy) had firsthand knowledge of the fact that Lloyd had drugs in the apartment, the deputy had to show that the totality of circumstances corroborated the hearsay in order for the warrant to be valid.¹⁰³ The court concluded that the totality of the circumstances did not corroborate Buckley's hearsay statement because she never specifically identified Lloyd as her source, nor did she ever

95. 677 N.E.2d 71 (Ind. Ct. App. 1997).

96. *Id.* at 73.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (quoting IND. CODE § 35-33-5-2(b)(1)-(2) (1993)).

102. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983)).

103. *Id.* at 74.

successfully obtain drugs from Lloyd.¹⁰⁴ Thus, the magistrate erred in issuing the warrant to search Lloyd's apartment.¹⁰⁵

Having found that the trial court erred, the appellate court took the next step to determine if the State could show that an exception to the warrant requirement existed where the officer conducting the search relied in good faith upon a properly issued, but subsequently invalidated warrant.¹⁰⁶ Lloyd claimed that the good faith exception did not apply because the warrant was "so lacking in indicia of probable cause that Deputy Sanders could not have formed an objectively reasonable belief in the validity of the warrant."¹⁰⁷

To support his argument, Lloyd relied upon two Indiana cases: *Everroad v. State*¹⁰⁸ and *Bradley v. State*.¹⁰⁹ In *Everroad*, a magistrate issued a search warrant for the defendant's home to find stolen property. The probable cause was based on lengthy hearsay statements which did not meet the tests because the officer offering the hearsay statements did not disclose his source nor establish that the source was credible.¹¹⁰ The good faith exception did not apply as the warrant was lacking indicia of probable cause such that no officer could reasonably rely on the warrant's validity.¹¹¹

In *Bradley*, the magistrate issued a search warrant which allowed the police to look for stolen property at the defendant's address based on an anonymous informant's description of a motel robbery.¹¹² The informant named Bradley as the person who committed the crime and said he had a history of arrests. Upon review, the supreme court said that the affidavit presented did not show that the informant was reliable or credible and the totality of the circumstances did not corroborate the informant's statements.¹¹³ The good faith exception did not apply since the affiant misinformed the court that his informant was reliable and the warrant was otherwise lacking in indicia of probable cause.¹¹⁴

Judge Baker found the facts in *Lloyd* distinguishable from *Everroad* and *Bradley* because Deputy Sanders had firsthand knowledge which, "when viewed in conjunction with Buckley's hearsay statement that she 'could run back to Bloomington' where 'her source still had some marijuana,' caused Deputy Sanders to harbor an objective belief in the validity of the warrant."¹¹⁵ Judge Baker concluded by stating that "(a)lthough, in retrospect, this court has determined that the magistrate erred, we cannot say that Deputy Sanders could

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 75.

108. 590 N.E.2d 567 (Ind. 1992).

109. 609 N.E.2d 420 (Ind. 1993).

110. *Lloyd*, 677 N.E.2d at 75 (citing *Everroad*, 590 N.E.2d at 571).

111. *Id.*

112. *Id.* (citing *Bradley*, 609 N.E.2d at 421-22).

113. *Id.* (citing *Bradley*, 609 N.E.2d at 422-23).

114. *Id.* (citing *Bradley*, 609 N.E.2d at 424).

115. *Id.*

not have held an objective good faith belief in the validity of the warrant.”¹¹⁶

Judge Najam wrote in his dissent that the affidavit was so lacking in indicia of probable cause that a belief in the validity of the warrant was unreasonable.¹¹⁷ He believed the majority incorrectly assumed that Buckley previously attempted to obtain marijuana from Lloyd when no reliable evidence supported that characterization.¹¹⁸ The deputy merely acted on a “hunch” that Lloyd was the source rather than any firsthand or personal knowledge of probable criminal activity.¹¹⁹ Judge Najam relied on *Everroad* for the proposition that “the good faith exception should not be allowed to save an otherwise invalid warrant based upon a chain of inferences connected only by unreliable hearsay.”¹²⁰ Judge Najam would have, therefore, granted the motion to suppress.

On a different note, the Indiana Court of Appeals determined that a patdown search of a passenger of a car at a sobriety checkpoint was not justified in *Banks v. State*.¹²¹ Banks appealed his conviction for “carrying a handgun without a license,” a class C felony, and raised the issue of whether the evidence seized from him during a patdown search was properly admitted at trial.¹²²

Banks was a passenger in a vehicle that passed through a sobriety checkpoint. A police officer questioned the driver who could produce neither the vehicle registration nor his driver’s license. The driver did not know the name of the owner of the car. When the officer smelled alcohol on the driver’s breath and saw an open, partially empty alcoholic beverage on the front seat, he asked the driver to move his car to the area set aside for further investigation. Once the driver told the police they were under twenty-one, the occupants were ordered to get out of the car. As Banks and the front seat passenger got out, the officer noticed that they showed signs of intoxication, and he saw a gun in plain view on the front passenger side floorboard. Subsequently, *another* officer found a gun during a patdown of Banks. Banks filed a motion to suppress which was denied.¹²³

In *Maryland v. Wilson*, the Supreme Court held that police officers who make lawful traffic stops may order passengers to get out of the car until the stop is completed.¹²⁴ Although a warrant or probable cause is usually required to make a traffic stop, an exception exists for sobriety checkpoints.¹²⁵ Thus, if the

116. *Id.* at 76.

117. *Id.* at 77 (Najam, J., dissenting).

118. *Id.*

119. *Id.*

120. *Id.* at 78 (citing *Everroad*, 590 N.E.2d at 570-71).

121. 681 N.E.2d 235, 239 (Ind. Ct. App. 1997).

122. *Id.* at 236.

123. *Id.* at 239.

124. *Id.* at 237 (citing *Maryland v. Wilson*, 117 S. Ct. 882, 886 (1997)).

125. *Id.* This is the case provided that the sobriety roadblock plan satisfies the three-prong balancing test in *Brown v. Texas*, 443 U.S. 47 (1979). The three-part test weighs “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *Id.* at 51; *see also* *Snyder v.*

sobriety checkpoint is properly conducted, both the driver and passengers may be asked to exit the vehicle during these stops.

The issue then turns on whether the police have the authority to conduct patdown searches of drivers and passengers who are lawfully stopped at a sobriety checkpoint. Indiana applies the "Terry" exception¹²⁶ which says that "a police officer 'justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' is entitled to conduct a limited patdown search of the suspect's outer clothing to search for a weapon."¹²⁷ The standard is whether a reasonably prudent person in the same circumstances would be warranted in believing that the officer's safety would be in danger.¹²⁸ In addition, due weight must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experiences.¹²⁹ The patdown search of Bank's failed to meet this test. Even if the officers believed the car was stolen and that the passengers were underage drinkers, these beliefs do not necessarily support the inference that a person is armed and presently dangerous.¹³⁰

The court then discussed the 'inevitable discovery' exception to the exclusionary rule first set out by the Supreme Court in 1984.¹³¹ The Supreme Court held that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense."¹³² In *Banks*, had there been no premature patdown of Banks, the original officer would have seen the other gun in plain view on the floorboard and it would then have been reasonable to believe that the passengers might presently be armed and dangerous, thus justifying a patdown search.¹³³ The trial court was therefore within its discretion to admit the weapon under the inevitable discovery exception.¹³⁴

In *D.I.R. v. State*, the court of appeals rendered a decision in another patdown case, but in a school setting.¹³⁵ D.I.R. was a sixteen year old student attending

State, 538 N.E.2d 961 (Ind. Ct. App. 1989) (discussing the constitutional validity of sobriety checkpoints); *State v. Garcia*, 500 N.E.2d 158, 163 (Ind. 1986) (upholding sobriety checkpoints based on a weighing of the three-prong *Brown* test).

126. *Banks*, 681 N.E.2d at 237 (citing *Wilson v. State*, 670 N.E.2d 27, 29 (Ind. Ct. App. 1996)).

127. *Jackson v. State*, 669 N.E.2d 744, 747 (Ind. Ct. App. 1996) (quoting *Terry v. State*, 392 U.S. 1, 24 (1968)).

128. *Id.*

129. *Terry*, 392 U.S. at 27.

130. *Banks*, 681 N.E.2d at 239.

131. *Nix v. Williams*, 467 U.S. 431, 443 (1984).

132. *Id.* at 444 (footnote omitted).

133. *Banks*, 681 N.E.2d at 240.

134. *Id.*

135. 683 N.E.2d 251 (Ind. Ct. App. 1997).

an after-hours program for students dismissed from regular studies. The school had a policy that every student was subject to a search with an electronic wand metal detector to detect the presence of a Walk Man, a pager, or a weapon. On the day in question, D.I.R. arrived late to class. The wand had already been locked in the principal's office, so the security officer manually searched D.I.R.'s pockets. The officer found two marijuana cigarettes, rolling papers, and a pipe. After a denial of the motion to suppress, the trial court found D.I.R. to be a delinquent child and she appealed.¹³⁶

D.I.R. claimed that the search violated her rights under the Fourth Amendment to the U.S. Constitution and Article I, section 11 of the Indiana Constitution.¹³⁷ The court of appeals held that although a judicially issued search warrant is a condition precedent to a lawful search, "searches conducted by school officials in a school setting are subject to a less stringent standard."¹³⁸ The court cited the Supreme Court case, *New Jersey v. T.L.O.*, for the proposition that, because school officials are state actors fulfilling state objectives, the standard Fourth Amendment prohibition against unreasonable searches and seizures applies to school searches.¹³⁹ Deviation from strict adherence to the warrant requirements, however, is permitted to balance the privacy interests of school children against the need for teachers and administrators to maintain order in the public schools.¹⁴⁰ The standard, according to the Court, is whether under all the circumstances, the search of a student by a school official is reasonable.¹⁴¹

In *T.L.O.*, the Supreme Court adopted a two-prong test which was subsequently adopted in Indiana.¹⁴² First, the search must be justified at its inception. This occurs when there are "reasonable grounds for suspecting that the search will turn up evidence that the student is or has violated the law or a school rule."¹⁴³ Second, the search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."¹⁴⁴

In *D.I.R.*, the Indiana Court of Appeals rejected the State's argument that *T.L.O.* and its progeny are inapplicable because those cases involved particular students and the search in *D.I.R.* involved every student.¹⁴⁵ In response to the State's characterization of the search as "improvisational," the court noted that the "improvisational nature of the search is precisely what renders it constitutionally infirm."¹⁴⁶ The intrusion of "reaching into D.I.R.'s pockets in

136. *Id.* at 252.

137. *Id.*

138. *Id.*

139. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985)).

140. *Id.* (citing *T.L.O.*, 469 U.S. at 341).

141. *Id.*

142. *Id.* (citing *Berry v. State*, 561 N.E.2d 832 (Ind. Ct. App. 1990)).

143. *Id.* at 253.

144. *Id.* (citing *T.L.O.*, 469 U.S. at 341-42).

145. *Id.*

146. *Id.*

light of her age, sex, and nature of the search was not justified under the circumstances.”¹⁴⁷ Therefore, the trial court was reversed.¹⁴⁸

In *State v. Scheibelhut*,¹⁴⁹ the Indiana Court of Appeals reviewed the State’s appeal of the granting of a motion to suppress based on the trial court’s opinion that a consent to search was deemed involuntary, and thus invalid, because the defendant was not advised of his right to withhold his consent.¹⁵⁰ Scheibelhut was driving a car which was stopped by a Kokomo police officer. Scheibelhut was cooperative and provided the officer with his license and registration. The officer decided to ask permission to search Scheibelhut’s person and his car because there had been several incidents of vandalism in the area by means of a pellet gun. Scheibelhut agreed and got out of his car. The officer patted him down and asked him whether he had a pellet gun in his car. Scheibelhut said that he did and it was under the seat. In addition to the gun, the officer found marijuana. Scheibelhut was charged with possession of marijuana.¹⁵¹

The trial court granted the motion to suppress solely on the basis that the officer did not tell Scheibelhut that he could refuse to be searched.¹⁵² The appellate court reviewed the standard for consent searches by noting that the State has the burden of proving that the consent was freely and voluntarily given.¹⁵³ The court wrote:

The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. A consent to search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law. ‘Though consent may constitute a waiver of Fourth Amendment rights, to be valid a waiver must be an intelligent relinquishment of a known right or privilege. Such a waiver cannot be conclusively presumed from a verbal expression of assent. The Court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld.’¹⁵⁴

In *Scheibelhut*, the trial court determined that the officer’s failure to advise Scheibelhut that he could refuse to consent to the search rendered the consent involuntary. The court of appeals noted, however, that knowledge of the right to refuse is but one of the factors the court must use to determine

147. *Id.*

148. *Id.*

149. *Id.* at 822.

150. *Id.*

151. *Id.*

152. *Id.* at 822-23.

153. *Id.* (citing *Thurman v. State*, 602 N.E.2d 548 (Ind. Ct. App. 1992)).

154. *Id.* at 823 (citations omitted) (quoting *United States v. Payne*, 429 F.2d 169, 171 (9th Cir. 1970)).

voluntariness.¹⁵⁵ The trial court erred, because it did not consider the totality of the circumstances, but merely focused on the lack of consent.¹⁵⁶ The court of appeals remanded the case with instructions to reevaluate Scheibelhut's motion to suppress considering such factors as:

- 1) Whether the defendant was advised of his Miranda rights prior to the request to search; 2) the defendant's degree of education and intelligence; 3) whether the defendant was advised of his right not to consent; 4) whether Officer Galloway made any express or implied claims of authority to search the vehicle without consent; 5) whether Officer Galloway was engaged in any illegal action prior to the request; 6) whether the defendant previously was cooperative; and 7) whether Officer Galloway was deceptive as to his true identity or the purpose of his search.¹⁵⁷

B. Intimidation

The court of appeals rendered two decisions in the last term dealing with the offense of intimidation. In *Ajabu v. State*,¹⁵⁸ Mmoja Ajabu was charged with intimidation for having made threats against Steve Nation (the Hamilton County prosecutor) and Debra Meyer (the mother of two slain children) in the highly publicized Carmel murder case in which Mmoja's son, Kofi, was charged. Mmoja made these threats to several television reporters outside the courtroom at a death penalty hearing. He said: "And I want to serve notice as a father that if my son is killed for something that he did not do, then there will be other death sentences carried out."¹⁵⁹ Mmoja made the same statement to a newspaper reporter and said that he was referring to the prosecutor and the mother of the two murder victims. The day after the hearing, Mmoja appeared on a radio talk show and said "I didn't make the rules. Steve Nation made the rules. I'm just playing the game. I'm saying that if he [Kofi] is killed for something he did not do, then I'm going to respond in kind."¹⁶⁰

Mmoja was then interviewed by a television reporter who asked him what he meant when he said "other death sentences would be carried out." He responded, "I meant exactly what I said," and "if they're going to kill my son for something he did not do, then I'm going to kill somebody for something they did not do. They should have stopped Steve Nation from killing my son."¹⁶¹ The reports of the threats were carried by the Indianapolis media and were broadcast over the area in Hamilton County where Nation and Meyer lived. The broadcasts

155. *Id.*

156. *Id.*

157. *Id.* at 824 (footnote omitted).

158. 677 N.E.2d 1035 (Ind. Ct. App. 1997).

159. *Id.* at 1037.

160. *Id.* at 1038.

161. *Id.*

occurred on several occasions over a three day period, and included television and newspaper reports, as well as excerpts from Mmoja's statements.

Mmoja was charged by the grand jury on two counts of intimidation. First, he was charged with communicating a threat to Nation with the intent that Nation engage in conduct against his will.¹⁶² The count was charged as a class D felony because the threat was meant to intimidate Nation in his capacity as a law enforcement officer, causing him not to carry out his duties. Second, Mmoja was charged with communicating a threat to Meyer with the intent to place her in fear of retaliation for her prior lawful act of expressing her support for Nation's decision to seek the death penalty.¹⁶³ This count also was charged as a class D felony because the threat was to commit a forcible felony.

Mmoja moved to dismiss the grand jury indictment, alleging that the evidence was insufficient as a matter of law to sustain the two convictions for intimidation.¹⁶⁴ Mmoja's argument was that since the statements were made through the news media and neither Nation nor Meyer was present when the statements were made, they were not communicated directly to another person in the manner required by the statute.¹⁶⁵ However, Judge Najam held that "[t]he text of the intimidation statute does not limit the phrase 'communicates a threat to another person' to only those threats made directly to or in the presence of the threatened party."¹⁶⁶

The court distinguished *Bolen v. State*,¹⁶⁷ in which the defendant told a police officer that he was going "to get" and "to kill" the county prosecutor, although the prosecutor was not present at the time.¹⁶⁸ The court reasoned that Mmoja's statements were spoken in front of microphones and television cameras and thus were communicated to the public, including Nation and Meyer.¹⁶⁹ The court found that the threats were "not idle or private comments but messages which he repeatedly and emphatically sought to convey through the news media" and, as such, the evidence supported the conclusion that Mmoja knew or had good reason to believe the threats would reach Nation and Meyer.¹⁷⁰

In *Gaddis v. State*,¹⁷¹ Duane Gaddis was convicted at trial of intimidation. While driving on Interstate 465, Carver observed a car driven by Gaddis approach his car and he felt Gaddis was following too closely. Traffic was heavy, but Gaddis moved across to the far right lane. Carver then moved to the center lane at which time both men exchanged hand gestures and spoke toward each other. Neither could hear what the other was saying. During this time,

162. *Id.* at 1041.

163. *Id.* at 1042.

164. *Id.*

165. *Id.*

166. *Id.*

167. 430 N.E.2d 398 (Ind. Ct. App. 1982).

168. *Id.* at 401.

169. *Ajabu*, 677 N.E.2d at 1042.

170. *Id.* at 1043.

171. 680 N.E.2d 860 (Ind. Ct. App. 1997).

Gaddis removed a handgun from his glove compartment, displayed it in the window at a 45 degree angle and placed it near the console. Carver then backed off and called the police on his cellular phone. An Indiana State Police officer investigated and after hearing Carver's version of the story, went to the Gaddis home. He spoke with Gaddis, who admitted he took out the gun but denied openly displaying it. Gaddis had a valid gun permit.

A charging information was filed against Gaddis for intimidation. It read that Gaddis "did communicate to Donald Carver a threat, that is: an expression by words or actions, of an intent to harm Donald Carver, with the intent that Donald Carver be placed in fear of retaliation for a prior lawful act, that is: for Donald Carver having occupied a high speed lane of traffic on Interstate 465 . . ."¹⁷²

Writing for the court, Judge Najam found that the trial court had "misconstrued" the meaning of "threat" as defined by the legislature in that a threat requires that the defendant express an intention to unlawfully injure the person threatened.¹⁷³ In this case, Gaddis only raised his handgun for Carver to see. While Carver may have been frightened, he was not threatened as there was no evidence of intent to injure.¹⁷⁴ The court reversed the conviction and concluded by stating that "the intimidation statute should not be construed to criminalize the mere display of a weapon when the person charged has a constitutional right to carry it."¹⁷⁵

C. Expert Testimony

During the survey period, the appellate courts considered the admissibility of expert testimony in two different contexts. The supreme court considered the admissibility of evidence of automatism, while the court of appeals, in two different cases, considered the admissibility of evidence of Battered Women's Syndrome (BWS).

In *McClain v. State*,¹⁷⁶ the supreme court held that evidence of automatism bore on the voluntariness of conduct and was not a subclass of the insanity defense. Automatism is defined as "the existence in any person of behavior of which he is unaware and over which he has no conscious control."¹⁷⁷ Two days prior to an altercation with police officers for which he was charged, McClain had flown from Japan to Indianapolis. He had not slept on the flight. Moreover, he claimed to have slept only three hours during the forty-eight hours prior to his arrest.

McClain first interposed an insanity defense, asserting that sleep deprivation

172. *Id.* at 861.

173. *Id.*

174. *Id.*

175. *Id.* at 862.

176. 678 N.E.2d 104 (Ind. 1997).

177. *Id.* at 106 (quoting Donald Blair, *The Medicolegal Aspects of Automatism*, 17 MED. SCI. L. 167 (1977)).

prevented him from forming the intent necessary to commit the crimes charged.¹⁷⁸ He later withdrew this defense after further research and his conclusion that evidence of automatism did not need to be presented as an insanity defense.¹⁷⁹ Based on the withdrawal of the insanity defense, the trial court granted the State's motion in limine excluding "any expert testimony regarding sleep disorders and/or dissociative states."¹⁸⁰ An interlocutory appeal of that ruling ensued, and the court of appeals affirmed the trial court.¹⁸¹ On transfer, the supreme court reversed.¹⁸²

After noting that other jurisdictions are split between recognizing insanity and automatism as separate defenses on the one hand and classifying automatism as a species of the insanity defense on the other, the supreme court compared the Indiana statutes related to voluntary conduct and the insanity defense.¹⁸³ The supreme court held that automatism is not a species of the insanity defense for four primary reasons.¹⁸⁴ First, while automatistic behavior could be caused by insanity, it "need not be the result of a disease or defect of the mind."¹⁸⁵ Second, the Indiana General Assembly placed the voluntary act requirement in a different statute from the insanity defense, thus evidencing a legislative intent to view them separately.¹⁸⁶ Third, a sane but automatistic defendant should not be forced to plead insanity (and face the possibility of commitment) or present no defense at all.¹⁸⁷ Finally, unlike insanity cases, there is no need to appoint independent psychiatrists at public expense in automatism cases.¹⁸⁸

Instead, the supreme court held that evidence of automatism bears on the voluntariness of a defendant's actions.¹⁸⁹ "Accordingly, at trial McClain can call expert witnesses and otherwise present evidence of sleep deprivation and automatism. . . . The State is entitled to call its own experts and challenge McClain's evidence. . . ."¹⁹⁰ The State is required to prove all material elements of a charge beyond a reasonable doubt, and the voluntariness of the defendant's conduct is one such element.¹⁹¹

The court of appeals considered the admissibility of evidence of Battered Women's Syndrome (BWS) in two different contexts, finding it admissible in

178. *Id.* at 105.

179. *Id.*

180. *Id.*

181. *McClain v. State*, 670 N.E.2d 911 (Ind. Ct. App. 1996).

182. *McClain*, 678 N.E.2d at 107.

183. *Id.*

184. *Id.*

185. *Id.* at 108 (quoting *State v. Caddell*, 215 S.E.2d 348, 360 (N.C. 1975)).

186. *Id.*

187. *Id.* at 109.

188. *Id.*

189. *Id.* at 107.

190. *Id.*

191. *Id.* On remand, McClain was convicted after a three-day jury trial.

both. In *Barrett v. State*,¹⁹² the court of appeals held that BWS evidence was admissible to show that a defendant did not have the requisite intent to commit the crime of neglect of a dependent.¹⁹³ In *Carnahan v. State*,¹⁹⁴ the court of appeals found that BWS was admissible to show why a defendant's wife had recanted her allegations of abuse at trial.¹⁹⁵

In *Barrett*, the defendant, Alice Barrett, had been beaten by her father as a child and had spent most of her adult life in a series of relationships with abusive men. The last of these men was not only abusive toward her, but also beat her four-year-old daughter. Her boyfriend sometimes watched the child while Barrett was at work. Upon returning from work one morning, Barrett found her daughter dead. She was charged with neglect of a dependent, which is defined by statute as: "(a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally; (1) places the dependent in a situation that may endanger his life or health;"¹⁹⁶

Prior to trial, the court granted the State's motion in limine, which excluded evidence of BWS as either a defense or as evidence of Barrett's intent, character, or state of mind.¹⁹⁷ After finding no Indiana precedent allowing BWS as a defense to the crime of neglect of a dependent, the trial judge stated that the "defense is not available in a case in which the victim of the crime is not the perpetrator of the abuse, but instead the alleged perpetrator of abuse is a third-party."¹⁹⁸

On appeal, Barrett argued that evidence of BWS was relevant to show that she did not knowingly or intentionally neglect her child. She also argued that the BWS evidence was necessary to respond to the prosecutor's case by explaining why she stayed with the man charged with killing her child.¹⁹⁹ The court accepted both of these arguments, finding that a defendant who is accused of knowingly or intentionally committing a crime is entitled to present evidence in her own defense to negate that mental state.²⁰⁰

In *Carnahan*, the court of appeals upheld the admissibility of BWS evidence offered by the State to show why a defendant's wife had recanted her allegations of abuse at trial.²⁰¹ Paul Carnahan was charged with battery after his wife Carla filed a report with the police indicating that her husband had punched her in the stomach and struck her in the face. When called by the State to testify at trial, however, Carla recanted and testified that her husband had never hit her.

The State then called an expert on domestic violence who offered an

192. 675 N.E.2d 1112 (Ind. Ct. App. 1997).

193. *Id.* at 1118.

194. 681 N.E.2d 1164 (Ind. Ct. App. 1997).

195. *Id.* at 1168.

196. *Barrett*, 675 N.E.2d at 1116 (quoting IND. CODE § 35-46-1-1 (1993)).

197. *Id.* at 1115.

198. *Id.*

199. *Id.*

200. *Id.* at 1117.

201. *Carnahan*, 681 N.E.2d at 1168.

explanation of why Carla might change her story, explaining that battered women go through a three-part cycle of violence and they often remain with their husbands because of financial, emotional, religious, and other concerns.²⁰² On appeal, Carnahan claimed that the evidence was irrelevant or, in the alternative, that it was misleading and should have been excluded under Indiana Rule of Evidence 403.²⁰³

Noting that a trial judge is accorded discretion in ruling on the relevancy and admissibility of expert testimony, the court of appeals held that such evidence was properly admitted because it was “directly relevant to Carla’s credibility which, because she testified, was an issue at trial.”²⁰⁴ The court of appeals also found that a proper foundation was laid for the testimony by showing that 1) the expert had the requisite knowledge, skill, education, and experience on which to base her opinion, and 2) the facts upon which the expert testified were already in evidence.²⁰⁵ The court of appeals rejected Carnahan’s argument that the State had not established the latter of these, based on evidence that Carla had previously stayed at a battered women’s shelter, the police reports of the alleged abuse, and the police photos showing the injuries.²⁰⁶

D. Speedy Trial

The Indiana Supreme Court and court of appeals considered a defendant’s right to a speedy trial in two different contexts. The supreme court considered whether the protections of Indiana Criminal Rule 4 apply to the retrial of a habitual offender count. The court of appeals considered the separate issues of a defendant’s acquiescence to delay and the effect of the unavailability of defense counsel on a defendant’s right to a speedy trial.

In *Poore v. State*,²⁰⁷ the Indiana Supreme Court held that the time limits of Indiana Criminal Rule 4 apply to retrials of habitual offender counts. In so doing, the court reversed the court of appeals.²⁰⁸ Indiana Criminal Rule 4(B) provides that “[i]f any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion”²⁰⁹ The court’s opinion focused on a question of first impression in Indiana—whether the retrial of a habitual offender enhancement was a “trial” in the context of Indiana

202. *Id.* at 1166.

203. *Id.* at 1167.

204. *Id.*

205. *Id.*

206. *Id.*

207. 685 N.E.2d 36 (Ind. 1997).

208. *Poore v. State*, 660 N.E.2d 591 (Ind. Ct. App. 1996). The court of appeals opinion was discussed in last year’s survey. See Gary L. Miller & Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 30 IND. L. REV. 1005, 1021-22 (1997).

209. IND. CRIM. R. 4(B)(1).

Criminal Rule 4.²¹⁰

The court noted that while a habitual offender enhancement is neither a separate offense nor a separate conviction, a habitual offender proceeding has many aspects similar to a conventional “trial.”²¹¹ First, the same burden of proof applies, since the State must prove the existence of two prior unrelated felony convictions beyond a reasonable doubt.²¹² Second, the Double Jeopardy Clause of the Fifth Amendment bars reprocsecution of a habitual offender charge when the State fails to prove that status due to insufficient evidence.²¹³ Finally, unlike a sentencing hearing in which the Indiana Rules of Evidence do not apply, the same evidentiary protections of a trial apply to a habitual offender proceeding.²¹⁴

The court also discussed some policy considerations which support extending Indiana Criminal Rule 4 protections to a habitual offender retrial. The first of these is the seriousness of the potential penalty, which can be up to an additional thirty years.²¹⁵ Second, an important purpose of providing a speedy trial is to minimize the anxiety and humiliation that accompany public accusation. This would apply to a habitual offender determination just as it would apply to a trial.²¹⁶ Finally, a speedy trial enables a defendant to make his case before exculpatory evidence vanishes or becomes stale.²¹⁷

The supreme court concluded that “defendants are entitled to a reasonably prompt adjudication of this determination,” which includes the seventy day time limit of Indiana Criminal Rule 4(B).²¹⁸ However, an important consideration not mentioned by the majority is that the State should not need seventy days to retry such a case. All the necessary documents should have been admitted into evidence at the previous trial. The State merely needs to resubmit the documents from the prior trial and re-subpoena a fingerprint expert to testify. This should take no longer than a few weeks.

The court of appeals also considered speedy trial issues in two different contexts. In *Townsend v. State*,²¹⁹ the defendant orally moved for a speedy trial at his initial hearing. The court set a trial date for the seventy-first day after his request—one day beyond the seventy day requirement of Indiana Criminal Rule

210. *Poore*, 685 N.E.2d at 39.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 40.

217. *Id.* The court of appeals had concluded that the passage of time works only to the defendant’s advantage by making the State’s proof more difficult. However, the supreme court noted that “mistaken identity or alibi are in issue and the dimming of memories operate to the defendant’s disadvantage.” *Id.* In a habitual offender phase of a trial, such things are extremely unlikely. The State presents its evidence through police records, court documents, and the testimony of a fingerprint expert. The defendant almost never presents evidence.

218. *Id.* at 41.

219. 673 N.E.2d 503 (Ind. Ct. App. 1996).

4(B).²²⁰ Although the defendant was in court on two separate occasions for hearings prior to his trial, he did not object to the trial setting until five days prior to the trial date.²²¹

The court cited the Indiana Supreme Court's decision in *Wright v. State* for the proposition that "a defendant must object at the earliest opportunity when his trial is set beyond the time limitations of Crim. Rule 4. [citation omitted]. If an objection is not timely made, the defendant is deemed to have acquiesced to the later trial date."²²² In that case, the defendant had delayed "nearly a month" before filing an objection to the trial date, which "allowed a reasonable assumption that he abandoned his request for a speedy trial. . . ."²²³ In contrast, Townsend waited nearly two months after the setting of his trial date to object. Because an earlier objection would have allowed the trial court to reset the trial within the proper period, the court of appeals held that the defendant had acquiesced to a trial date beyond the seventy-day limit and was therefore not entitled to discharge.²²⁴

In *Lockhart v. State*,²²⁵ the court of appeals considered whether the trial court erred in setting an Indiana Criminal Rule 4(B) case beyond the seventieth day based on unavailability of defense counsel. At a pretrial conference two weeks before the scheduled jury trial, defense counsel indicated that he would likely be unable to begin Lockhart's trial as scheduled on June 6, because he was also representing another defendant charged with conspiracy to commit murder in a jury trial scheduled to begin on June 5. He requested a one-week continuance. However, because the trial judge had three other trials scheduled for that day, the case was continued to July 18. Believing that he could finish the other trial in two days, defense counsel objected to the setting and stated that he would be ready to commence Lockhart's trial on June 7. The deputy prosecutor at Lockhart's pretrial conference estimated that the conspiracy to commit murder case would take a minimum of three days to complete, so the trial judge allowed the July 18 trial setting to stand.²²⁶

On appeal, Lockhart argued that it was improper for the court to base "its determination of the likelihood of the availability of the defense counsel, solely on the speculation of two deputy prosecuting attorneys, not involved in the potentially conflicting case."²²⁷ Since Lockhart did not provide a developed argument or citation to authority in support of his contention, the court of appeals held that the trial judge did not abuse his discretion in setting the trial beyond the

220. *Id.* at 506.

221. *Id.* at 505.

222. *Id.* at 506 (quoting *Wright v. State*, 593 N.E.2d 1192, 1195 (Ind. 1992)).

223. *Id.*

224. *Id.* The court of appeals also rejected Townsend's argument that he was denied the effective assistance of counsel, since he "failed to show that his proceeding would have been different but for his trial counsel's failure to object to the trial date." *Id.* at 507.

225. 671 N.E.2d 893 (Ind. Ct. App. 1996).

226. *Id.* at 898.

227. *Id.*

seventy day period due to court congestion.²²⁸

While the court of appeals opinion does not cite *Clark v. State*, the court nonetheless applied *Clark*'s deferential standard in reviewing the trial court's finding.²²⁹ On appeal, the trial court's findings will be accorded "reasonable deference," and reversal will only occur if the trial court was "clearly erroneous."²³⁰ A trial judge faced with a situation such as the one in *Lockhart* would be well-advised to say as little as possible and not solicit scheduling information from the prosecutor.

Lockhart's case had been set for June 5, and defense counsel was unavailable on that day. The judge could have simply granted *Lockhart*'s continuance and set the case for trial on July 18. The period of delay would be chargeable to the defendant. If the defendant objected to this setting, the trial judge could note that the court's calendar was congested on all of the intervening days due to cases previously scheduled for trial. Trial judges cannot be expected to schedule jury trials on short notice or on every day of the week in order to meet the scheduling desires of defense counsel.

E. Guilty Pleas

In *Rhoades v. State*,²³¹ the Indiana Supreme Court examined the circumstances under which a guilty plea may be withdrawn. *Rhoades* entered a plea of guilty to operating a motor vehicle with a controlled substance in her blood.²³² After the trial court refused to allow her to withdraw her plea, she appealed. The court of appeals reversed the trial court, holding that the factual basis for her plea of guilty was insufficient.²³³ Judge Garrard dissented, stating that the trial court should take judicial notice that "when metabolites of marijuana are present in a person's urine it is because they are also present in that person's blood" and therefore a legally sufficient factual basis for the defendant's guilty plea was present.²³⁴

The defendant's argument, which was accepted by the court of appeals, was that the State could not establish a factual basis for the guilty plea since there was no test showing the presence of marijuana in the blood, as required by statute.²³⁵ To support its argument, the defense cited three cases: *Estes v. State*,²³⁶ *Hoornaert v. State*,²³⁷ and *Moore v. State*.²³⁸ However, the supreme court

228. *Id.*

229. 659 N.E.2d 548 (Ind. 1995).

230. *Id.* at 552.

231. 675 N.E.2d 698 (Ind. 1996).

232. *Id.* at 700 (Rhodes was charged with violating IND. CODE § 9-30-5-1(b) (1993)).

233. *Rhoades v. State*, 661 N.E.2d 608 (Ind. Ct. App. 1996).

234. *Id.* at 612 (Garrard, J., dissenting).

235. *Id.*

236. 656 N.E.2d 528 (Ind. Ct. App. 1995).

237. 652 N.E.2d 874 (Ind. Ct. App. 1995).

238. 645 N.E.2d 6 (Ind. Ct. App. 1994).

distinguished those cases, which were appeals from convictions from operating a vehicle with a controlled substance in the blood, and *Rhoades*, which was the appeal of a guilty plea.²³⁹ The standard of review is substantially different.²⁴⁰

The applicable standard for reviewing a sufficient factual basis to support a guilty plea is less stringent.²⁴¹ The standard is that appellate courts will review the trial court's determination regarding a factual basis for a guilty plea for abuse of discretion only.²⁴² The court recognized the test for establishing a factual basis to support a guilty plea is whether there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty but that a trial court may not enter judgment for conviction unless the evidence shows guilt beyond a reasonable doubt.²⁴³ “Reasonably concluding” guilt is not the same as concluding guilt beyond a reasonable doubt.”²⁴⁴

The trial court was given “ample” evidence of the defendant’s guilt, including that “Rhoades was involved in an automobile accident; there was a pipe on her front seat that smelled of burned marijuana; and her urine contained marijuana metabolites.”²⁴⁵ From this evidence, the trial court could reasonably conclude the defendant’s guilt and therefore did not abuse its discretion. In addition, the supreme court disagreed with the court of appeals’ conclusion that section 9-30-5-1(b) of the Indiana Code requires a blood test. Rather, the statute “merely makes it a crime to operate a vehicle with a controlled substance in that person’s blood. It does not provide for a particular means of proving such.”²⁴⁶ However, the court rejected Judge Garrard’s opinion that judicial notice is an acceptable method for proving that if a controlled substance is present in the urine, then it must be present in the blood.²⁴⁷

The supreme court also considered two very different issues related to guilty pleas in a pair of death penalty cases. In *Smith v. State*,²⁴⁸ the supreme court considered whether a defendant could enter into a negotiated plea agreement for the death sentence. In *State v. VanCleave*,²⁴⁹ the court considered the proper standard for vacating a guilty plea on the basis of ineffective assistance of counsel.

In *Smith*, amicus curiae challenged, over the defendant’s objection, the imposition of the death sentence as part of a negotiated plea agreement. Robert Smith was an inmate at the Wabash Valley Correctional Institution when he and another inmate stabbed a fellow inmate to death. Soon after being charged,

239. *Rhoades*, 675 N.E.2d at 701.

240. *Id.*

241. *Id.*

242. *Id.* at 702.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. 686 N.E.2d 1264 (Ind. 1997).

249. 674 N.E.2d 1293 (Ind. 1996).

Smith sent a letter to the editor of the local paper in which he wrote that it would be a waste of taxpayer money to take him to trial to give him an additional fifty to sixty years. He stated that he desired to plead guilty to the death sentence.²⁵⁰

A "Negotiated Plea Agreement" was filed in which Smith would plead guilty to the murder in exchange for the State's recommending the death penalty and dismissing the conspiracy charge.²⁵¹ At the plea hearing, the trial judge questioned Smith about his mental capacity and his understanding of the rights he would be waiving by pleading guilty. At the same hearing, Smith admitted to intentionally stabbing and killing a human being while incarcerated, which is one of the statutory aggravators for the death sentence.²⁵²

Shortly before the sentencing hearing, Smith's counsel requested the appointment of psychiatrists and the scheduling of a competency hearing. At a hearing on the motion, Smith maintained that he was competent and explained why he was seeking the death sentence: "I don't have a future, you know. I mean, if I don't get the death sentence, I still don't have a future. What I've got is a slow death. I'm asking the court to give me justice, give me—let me die . . ."²⁵³ At Smith's competency hearing, both court-appointed doctors testified that they believed Smith understood the proceedings and was competent to stand trial.²⁵⁴ The plea agreement was later accepted, and the defendant was sentenced to death.²⁵⁵

On appeal, amicus argued that the death penalty²⁵⁶ and plea agreement statutes,²⁵⁷ when read together, "do not permit negotiated plea agreements for the death penalty."²⁵⁸ The supreme court, however, found that the trial court's procedure was a "proper harmonizing of the two statutes."²⁵⁹ The trial court had determined on two different occasions that Smith had the capacity to enter into the agreement and that he knowingly and voluntarily waived his rights. The state showed incontrovertible evidence of guilt, and Smith confessed to the crime in open court. At a subsequent hearing, the State showed beyond a reasonable doubt the existence of a statutory aggravating factor, and after finding that it outweighed any mitigating evidence, the trial judge accepted the plea agreement and sentenced Smith to death.

In *Van Cleave*, the supreme court considered the proper standard under which a guilty plea may be vacated on grounds of ineffective assistance of counsel.²⁶⁰ Gregory Van Cleave pleaded guilty in 1983 to felony murder, and the

250. *Smith*, 686 N.E.2d at 1266.

251. *Id.* at 1267.

252. See IND. CODE § 35-50-2-9 (1993 & Supp. 1997).

253. *Smith*, 686 N.E.2d at 1268.

254. *Id.*

255. *Id.* at 1269.

256. See IND. CODE § 35-50-2-9 (1993 & Supp. 1997).

257. See *id.* § 35-35-3-3.

258. *Smith*, 686 N.E.2d at 1270.

259. *Id.* at 1271.

260. 674 N.E.2d at 1293.

plea agreement allowed the sentencing judge to choose between sixty years in prison or the death penalty. The death penalty was imposed; however, it was later set aside via a petition for post-conviction relief granted on the grounds of ineffective assistance of counsel.²⁶¹ The post-conviction court based its ruling on Van Cleave's showing "that his lawyer's performance was deficient and, but for counsel's errors, Van Cleave would not have pleaded guilty."²⁶²

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show: 1) the lawyer's performance fell below an "objective standard of reasonableness," and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁶³ In considering the second tier of the analysis (the "prejudice" prong), the supreme court considered whether it was sufficient to set aside a conviction if the postconviction court concluded that there was a reasonable probability the defendant must would not have pleaded guilty but for counsel's deficient performance, or whether the defendant must establish a reasonable probability that the ultimate result—i.e. the conviction—would have been different.²⁶⁴

After discussing Supreme Court precedent on ineffective assistance of counsel issues and policy considerations, the court held that a defendant must show a reasonable probability that the outcome—the ultimate conviction—would have been different.²⁶⁵ The court noted that the prejudice requirement derives from the significant state interest in finality of judgments.²⁶⁶ Moreover, proof of a crime can be difficult to establish years later because "witnesses die or move elsewhere, evidence becomes stale, and memories fade."²⁶⁷

The Indiana Supreme Court concluded that the state had presented "powerful evidence of Van Cleaver's culpability for felony murder at his sentencing hearing."²⁶⁸ Because the mitigating evidence which his lawyer failed to uncover did not establish a reasonable probability of acquittal, Van Cleave's right to effective assistance of counsel was not sufficiently violated to warrant the setting aside of his guilty plea.²⁶⁹

F. Jury Deliberations

The supreme court and court of appeals decided a number of cases which dealt with a variety of issues related to jury deliberations. Four of the cases will be discussed below.

261. *Id.* at 1295.

262. *Id.*

263. *Id.* at 1296 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)).

264. *Id.*

265. *Id.* at 1306.

266. *Id.* at 1300.

267. *Id.* at 1301.

268. *Id.* at 1306.

269. *Id.*

In *Hagenmeyer v. State*,²⁷⁰ the court of appeals held that it was reversible error to allow jurors to listen to tapes of the victim's testimony without the defendant present.²⁷¹ After the jury had begun its deliberations, the foreman informed the trial court that the jury wanted to review tapes of the victim's testimony because the members could not remember the testimony.²⁷² Even though defense counsel informed the court that he and the defendant had a right to be present during the replaying of the evidence and desired to be present, the trial court allowed the jury to listen to the testimony with only the bailiff and court reporter present.²⁷³

"A defendant has the right to be present during all stages of the trial requiring the presence of the jury."²⁷⁴ Any waiver of this right "must be express and given by the defendant personally."²⁷⁵ Not only did Hagenmeyer not waive this right, he objected to the procedure. Because the bailiff and court reporter have no obligation to protect a defendant's interest and their presence is not a substitute for a defendant's own presence, the court of appeals reversed the conviction.²⁷⁶

In *Anglin v. State*,²⁷⁷ the court of appeals held that the trial court failed to follow the proper procedure in responding to notes from the jury during deliberations, but there was no prejudice to the defendant.²⁷⁸ The court responded to two separate notes from the jury by sending a written response to the jury room without first returning the defendant and his counsel into the courtroom.²⁷⁹ The proper procedure, however, "is for the judge to notify the parties so they may be present in court before the judge communicates with the jury, and the judge should inform the parties of his proposed response."²⁸⁰

Anglin's case was further complicated because the two notes concerned similar evidence,²⁸¹ thus raising the concern that there was jury disagreement or confusion about the evidence.²⁸² "[W]hen a jury requests that it be given the opportunity to rehear testimony or see exhibits for a second time, the jury is expressing disagreement or confusion about that evidence, sufficient to trigger application of I.C. 34-1-21-6, unless the circumstances surrounding the request

270. 683 N.E.2d 629 (Ind. Ct. App. 1997).

271. *Id.* at 630.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. 680 N.E.2d 883 (Ind. Ct. App. 1997).

278. *Id.* at 886.

279. *Id.* at 884.

280. *Id.* at 885 (quoting *Madden v. State*, 656 N.E.2d 524, 526 (Ind. Ct. App. 1995)).

281. The first note read: "What is the definition of a Commitment paper." The second note stated: "Would like to see the evidence presented by the State—12 & 13 referring to 'Commitment' paper." *Id.* at 884.

282. *Id.* at 885.

indicate otherwise.”²⁸³

The two requests made by the jury in *Anglin* were not for the same piece of evidence or the same portion of testimony, thus the trial judge was not required to return the jury to open court and provide them with the requested information. In other cases, however, a trial judge’s response to the first jury request will likely have a significant impact on any subsequent requests. Therefore, judges often write very short and direct responses to jury requests.²⁸⁴

In *Isaacs v. State*,²⁸⁵ the supreme court considered whether it was juror misconduct for a juror to relate her experiences as a rape victim to other jurors deliberating on a verdict in a rape case. The day after a jury convicted Terry Isaacs of raping a woman at knifepoint, an alternate juror called the trial judge to report that a juror, who during voir dire stated that she had been a victim of rape, related to other jurors during deliberations that her rapist had also held a knife to her neck and that it did not leave any visible marks.²⁸⁶ This comment was made while jurors were discussing whether the defendant had used a knife when he raped the victim.

The supreme court compared the case to *Saperito v. State*, in which a juror related to other jurors during deliberations that he had viewed the crime scene and that a diagram of the scene accurately described the area.²⁸⁷ That court determined that the juror had testified regarding evidence not in the record, but held that any error was harmless.²⁸⁸

Unlike in *Saperito*, the juror in *Isaacs* merely informed her fellow jurors of her own experiences as a rape victim—and did not offer additional evidence.²⁸⁹ This was not error, as jurors had been instructed to use their own “knowledge, experience and common sense gained from day to day living.”²⁹⁰

In *Bradford v. State*,²⁹¹ the supreme court considered the issues of juror experiments and allowing jurors to separate overnight during deliberations. Glenn Bradford was convicted of the murder of an Evansville woman whose stabbed body was found in her residence after firefighters extinguished a fire there. During the course of the trial, the trial judge allowed the jurors to be taken to the scene of the crime to view the interior of the house. During deliberations, the jurors asked to revisit the house and to fill an empty gas can with water to determine how fast it could be emptied. The trial judge allowed another “jury

283. *Id.*

284. For example, the jury sends out a note asking, “Can we have a transcript of witness John Jones’ testimony?” An acceptable response would be, “I cannot provide you with a transcript of the testimony. Please rely on your memories.” A subsequent jury inquiry for the same transcript would be unlikely after the jury receives such a response.

285. 673 N.E.2d 757 (Ind. 1996).

286. *Id.* at 761.

287. 490 N.E.2d 274 (Ind. 1986).

288. *Id.* at 278.

289. *Isaacs*, 673 N.E.2d at 761.

290. *Id.*

291. 675 N.E.2d 296 (Ind. 1996).

view" of the house, but denied the request to conduct the gas can experiment by noting "[t]hat is not evidence. You cannot conduct your own experiments and make up your own evidence"²⁹²

After the trial, three jurors signed affidavits for the defense which stated that the jury conducted experiments by walking through the motions of emptying a gas can and by timing the amount of time it took to crawl through the house.²⁹³ Two other jurors signed affidavits for the State stating that the jury had followed the trial judge's order and not conducted any experiments.²⁹⁴ The supreme court held that the jury's activities were not improper, since anything they had done during the "jury view" was already in evidence through the testimony of the detective who had conducted experiments prior to trial and testified about those experiments at trial.²⁹⁵

The supreme court also considered the propriety of allowing the jurors to separate and go to their respective homes overnight during deliberations. The Indiana Code requires that the jury be kept together once deliberations begin,²⁹⁶ and the supreme court has taken this requirement very seriously in the past. In this case, however, after the trial judge stated that he intended to allow jurors go to their homes for the evening, defense counsel did not object.²⁹⁷ As the supreme court has previously held, a defendant cannot raise such an issue for the first time on appeal.²⁹⁸

G. Sentencing

The appellate courts considered a variety of issues relating to sentencing. The following issues will be discussed below: 1) whether the enhancement of a drug offense for being within 1,000 feet of school property is proper when the defendant was riding in a motor vehicle at the time of arrest; 2) whether a trial court can reattach a habitual offender enhancement to another conviction after the conviction to which it was originally attached was set aside on appeal; and 3) whether a defendant's probation can be revoked for failure to pay restitution when the basis for failure to pay was that the defendant was indigent because of his incarceration.

In *Polk v. State*,²⁹⁹ a defendant convicted of possessing cocaine within 1,000 feet of school property, a class A felony, argued that the enhancement should be restricted based on his status as a mere passenger in a car at the time of his arrest. Possession of cocaine is normally a class D felony.³⁰⁰ Polk argued that the

292. *Id.* at 304.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 304-05 (citing IND. CODE § 35-37-2-6(a)(1) (1993)).

297. *Id.* at 305.

298. *Id.* (citing *Pruitt v. State*, 622 N.E.2d 469 (Ind. 1993)).

299. 683 N.E.2d 567 (Ind. 1997).

300. *Id.* at 569.

legislature did not intend for the enhancement to apply in such circumstances, as it would not advance the underlying legislative objective of protecting school children from the effects of drugs, but would produce “absurd and unintended results.”³⁰¹ Moreover, he argued that upholding his conviction would enable the police to determine the class of felony for possession of cocaine by initiating a traffic stop near school property and that the enhancement does not reasonably inform average people that they will be subject to such severe penalties for possessing cocaine while stopped for a traffic offense near a school.³⁰²

Citing the recent case of *Walker v. State*,³⁰³ the supreme court noted that the school-zone element of the offense of *dealing* cocaine was a “strict-liability enhancement requiring no proof that the defendant knew he was dealing cocaine within 1000 feet of a school.”³⁰⁴ In *Polk*, however, the defendant did not argue intent, but rather that the statute should not be literally applied to the facts of his particular case.³⁰⁵

Because the goal of a drug-free school zone is a legitimate legislative objective, the supreme court rejected Polk’s claim that his Fourteenth Amendment right to due process of law and equal protection were violated by his conviction.³⁰⁶ Moreover, the court held that the enhancement provided clear notice of what conduct is prohibited and is rationally related to protecting the welfare of children.³⁰⁷

In *Greer v. State*,³⁰⁸ the supreme court held that a trial court could reattach a habitual offender attachment to a different count if the count to which it was originally attached was later set aside. In 1988, William Greer was convicted of attempted murder, class A felony robbery, and of being a habitual offender.³⁰⁹ He was sentenced to eighty years for attempted murder (fifty years for the offense, enhanced by thirty years for being a habitual offender) and fifty years for robbery.³¹⁰ In his first direct appeal, the supreme court reversed the attempted murder conviction, and the State decided not to retry that count.³¹¹ At the resentencing hearing, the trial court attached the habitual enhancement to the robbery count and sentenced the defendant to eighty years.³¹²

Noting that a jury finding of habitual offender status is not linked to any

301. *Id.*

302. *Id.* at 569-70.

303. 668 N.E.2d 243 (Ind. 1996). This case was discussed in last year’s Survey as well. See Miller & Schumm, *supra* note 208, at 1026-28.

304. *Polk*, 683 N.E.2d at 570.

305. *Id.*

306. *Id.* at 573.

307. *Id.*

308. 680 N.E.2d 526 (Ind. 1997).

309. *Id.* at 526.

310. *Id.*

311. *Id.*

312. *Id.* at 526-27.

particular conviction, the supreme court upheld the resentencing.³¹³ Just as the trial judge was free to attach the habitual offender enhancement to *any* felony count at the original sentencing, he possesses that same discretion when one of the counts is reversed on appeal.

In *Barnes v. State*,³¹⁴ the court of appeals held that the trial court did not err in revoking a defendant's probation for failure to make restitution payments.³¹⁵ In such cases, a court must find that a probationer has "willfully refused to make restitution or has failed to make sufficient bona fide efforts to pay" in order to revoke his probation.³¹⁶

At Barnes' revocation hearing, the trial court inquired into the reasons for his failure to pay and learned that Barnes had been incarcerated on two other charges for all but a few months of the probationary period.³¹⁷ Because "Barnes voluntarily engaged in a course of conduct which made him unable to comply with the financial conditions of his probation," the court affirmed the revocation of his probation.³¹⁸

H. Proportionality

In *State v. Moss-Dwyer*,³¹⁹ the Indiana Supreme Court was asked to determine whether a trial court impermissibly infringed on the legislature when it held that the crime of giving false information in an application for a handgun permit as a class C felony was unconstitutional on its face because it violated the proportionality requirement, Article I, Section 16.1 of the Indiana Constitution. Since the issue was purely a matter of law, the supreme court reviewed the matter *de novo*.³²⁰

The State charged Moss-Dwyer with giving false information in applying for a license to carry a handgun because she listed her former marital residence as her current address on the application.³²¹ In order to determine whether the offense was constitutionally proportional to the penalty, the trial court compared the penalty for giving false information to obtain a handgun license with the penalty for carrying a handgun without a license. The court distinguished *Conner v. State*³²² when it found that the penalty for giving false information was not disproportionate to the crime.³²³

In *Connor*, the defendant was convicted of distributing a substance

313. *Id.* at 527.

314. 676 N.E.2d 764 (Ind. Ct. App. 1997).

315. *Id.* at 765.

316. *Id.*

317. *Id.*

318. *Id.*

319. 686 N.E.2d 109 (Ind. 1997).

320. *Id.* at 110.

321. *Id.*

322. 626 N.E.2d 803 (Ind. 1993).

323. *Moss-Dwyer*, 686 N.E.2d at 112.

represented to be marijuana, which carried a more severe penalty than the defendant would have received had he distributed real marijuana.³²⁴ The supreme court found this decision to violate Indiana's proportionality provision.³²⁵

In *Moss-Dwyer*, the supreme court found that although Article I, Section 16 of the Indiana Constitution requires that “[a]ll penalties shall be proportioned to the nature of the offense,” the separation of powers doctrine requires the court “to take a highly restrained approach when reviewing legislative prescriptions of punishments.”³²⁶ The court distinguished *Conner* in several ways. First, in *Conner*, there was found to be a clear legislative pattern of treating marijuana offenses more leniently than other offenses relating to controlled substances. Punishing fake marijuana offenses more harshly than real marijuana offenses was, therefore, clearly disproportionate.³²⁷ The court found no such pattern in the handgun permit statutory scheme.³²⁸ Second, the court found that the crime for which Moss-Dwyer was convicted was deemed similar to other crimes involving misinformation or deceiving public officials including perjury, bribery, and obstruction of justice.³²⁹ Thus, “[t]he classification of giving false information on an application for a handgun permit as a class C felony does not appear so disproportionate as to justify striking down a legislative determination of the appropriate penalty.”³³⁰

In reversing the trial court, the supreme court rejected the defendant's claim that it was improper for a person to face a greater penalty for choosing to abide by the law and apply for a permit rather than carry a handgun without a license. The Indiana General Assembly “rightfully may penalize the wrongful act of giving misinformation on the permit application more severely than the separate wrongful act of carrying a handgun without having applied for a permit at all.”³³¹

324. *Connor*, 626 N.E.2d at 805.

325. *Id.* at 806.

326. *Moss-Dwyer*, 686 N.E.2d at 111.

327. *Id.* at 112.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 113.

SURVEY OF LABOR AND EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION

The 1997 survey period involved several significant decisions at both the state and federal levels in the area of employment law. The Seventh Circuit Court of Appeals issued opinions clarifying several standards of proof, including same-sex harassment, hostile environment and *quid pro quo* sexual harassment in situations where the supervisor was the alleged harasser. Moreover, the U.S. Supreme Court finally affirmatively answered the question of whether same-sex harassment was actionable under Title VII and clarified the required standard of proof. The Court also determined the proper standard for substantive FMLA claims. The Indiana Supreme Court issued a long awaited opinion limiting exceptions to the employment-at-will doctrine. This article summarizes the most significant developments for practitioners in this area of law and is not intended to be a complete recitation of all decisions or developments.

I. TITLE VII

A. Same-Sex Sexual Harassment

The Seventh Circuit tackled the hotly-debated issue of whether same-sex harassment is actionable under Title VII in *Doe by Doe v. City of Belleville*.¹ The court held same-sex harassment to be actionable, despite both alleged harassers and victims being heterosexual.²

In *Doe*, twin sixteen-year-old brothers, hired by the City of Belleville as summer help for lawn maintenance, were continually subjected to harassment by their male co-workers.³ One brother, H. Doe, was perceived by his co-workers as effeminate because he wore an earring. Co-workers subjected him to daily ridicule, predominantly of a sexual nature.⁴ In addition, H. was subjected to at least one incident of physical abuse involving a co-worker grabbing his testicles and remarking, “I guess he’s a guy.”⁵ The other brother, who was dubbed “fat

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1. 119 F.3d 563 (7th Cir. 1997).

2. *Id.* at 566.

3. *Id.*

4. Comments included referring to H. as a “fag” or “queer,” urging H. to “go back to San Francisco with the rest of the queers,” inquiring whether H. was a boy or a girl, and threatening H. with anal sex. *Id.* at 567.

5. *Id.*

boy" due to his weight, was spared most of these taunts.⁶ However, after J. Doe contracted poison ivy, a co-worker inquired whether H. had passed the poison ivy to his brother during anal sex.⁷ The brothers eventually quit due to the incessant taunting and brought an action for sexual harassment under Title VII.⁸

The district court granted summary judgment for the city because the plaintiffs failed to establish that the alleged behavior was "because of" their sex.⁹ The district court reasoned that the alleged comments implied that H. was homosexual, a trait not protected by Title VII.¹⁰

In reversing the lower court's decision regarding the sexual harassment claim, the Seventh Circuit concluded that same-sex harassment was actionable, noting that Title VII does not "purport to limit who may bring suit based on the sex of either the harasser or the person harassed."¹¹ Rejecting the notion that same-sex harassment claims may only be brought when the alleged harasser is homosexual, the court distinguished cases where the harassment is not explicitly sexual but is gender-based nonetheless from harassment that has explicit sexual overtones.¹² In the former type of discrimination, because the alleged harassment is not explicitly sexual, the plaintiff must establish differential treatment of men and women or gender animus to raise a cognizable claim.¹³ In the latter situation, the court concluded that the conduct itself established the nexus to the plaintiff's gender that Title VII required; therefore, the alleged harasser's motive in harassing the employee is irrelevant.¹⁴ This case is a must read for practitioners in this circuit as it delineates the standard of proof required to successfully bring a same-sex harassment claim under Title VII.

Notably, in a unanimous opinion, *Oncale v. Sundowner Offshore Services*, the Supreme Court recently found same-sex harassment to be actionable under Title VII.¹⁵ In *Oncale*, a male oil rig worker was subjected to repeated sex-

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 567-68.

10. *Id.*

11. *Id.* at 572-74. In so holding, the court focused on statutory construction and supportive precedent in other circuits. *Id.* at 573; see, e.g., *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141-43 (4th Cir. 1996); *Yearly v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 447-48 (6th Cir. 1997); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-80 & n.4 (8th Cir. 1996); *Fredette v. BVP Management Assocs.*, 112 F.3d 1503, 1506 (11th Cir. 1997).

12. *Doe-by-Doe v. City of Belleville*, 119 F.3d at 575-76, 585-86, 590-91.

13. *Id.* at 575-76.

14. *Id.* at 576-78 (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (stating that the intent to discriminate "in cases involving sexual propositions, innuendo, pornographic materials, or sexually derogatory language is implicit, and thus should be recognized as a matter of course.")). *Id.* at 576. Note that the Supreme Court rejected this conclusion in *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998).

15. *Oncale*, 118 S. Ct. at 1003.

related actions, including physical assault and threatened rape.¹⁶ In reversing summary judgment for the employer, the Supreme Court stated that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the Plaintiff and the defendant . . . are of the same sex."¹⁷ The court explained that in order to violate Title VII, workplace harassment must expose members of one sex to "disadvantageous terms and conditions of employment to which members of the other sex are not exposed."¹⁸ To establish a Title VII violation, the plaintiff must prove in every sexual harassment case that the alleged harassment was "because of sex."¹⁹ Moreover, the Court reemphasized that in order to violate Title VII, the alleged conduct must be so objectively offensive as to alter the conditions of the victim's employment.²⁰ *Oncale* sends a clear message that same-sex sexual harassment is actionable under Title VII. The district courts will be challenged to apply these standards to ascertain what level of conduct is necessary to implicate Title VII in these cases.

B. Retaliation Charges Brought By Former Employees

The Supreme Court recently concluded that former employees may bring a Title VII action against their former employer for post-employment retaliation.²¹ In *Robinson*, the plaintiff alleged that his former employer retaliated against him by providing a negative job reference after his termination.²² Reversing the lower court's decision, the Court found the statutory definition of "employee" to be ambiguous, and held that including former employees in the statutory construction comported with the primary purpose of Title VII.²³

C. Employer Liability For Sexual Harassment By Supervisors

The Seventh Circuit recently addressed the proper standard for supervisory sexual harassment.²⁴ Although the panel was unable to forge a clear-cut majority, the majority reached consensus that negligence is the proper standard for employer liability in hostile environment sexual harassment claims when the alleged harasser is the employee's supervisor.²⁵ The majority of the court further

16. *Id.* at 1001.

17. *Id.* at 1001-02.

18. *Id.* 1002. Thus, harassment is not automatically discrimination 'because of sex' merely because the words have sexual connotations. Nor is it necessary for harassing conduct to be motivated by sexual desire. *Id.*

19. *Id.*

20. *Id.*

21. *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997).

22. *Id.* at 845.

23. *Id.* at 849.

24. *Jansen v. Packaging Corp.*, 123 F.3d 490 (7th Cir. 1997).

25. *Id.* at 494-95; *accord Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (holding that employers are not "automatically liable for an environment of sexual harassment created by supervisors or co-workers; employers are liable only when they have been negligent

held that employer liability for *quid pro quo* sexual harassment is strict liability, even if the “supervisor’s threat does not result in a company act.”²⁶

Because of the wide range of opinions on the panel regarding the proper standards for supervisory sexual harassment, numerous concurrences and dissenting opinions were authored, which are briefly summarized:

- Judge Flaum asserted that for supervisory *quid pro quo* sexual harassment, employers should be vicariously liable under agency principles.²⁷ The basis of the employer’s liability results from the delegation of authority by the employer to the supervisor which in turn is used to harass.²⁸ Actionable *quid pro quo* harassment does not require an adverse job consequence; the threat itself violates the statute.²⁹ The exception to the general rule of vicarious liability would involve a situation where a plaintiff “could not have reasonably believed that it was within the supervisor’s power to affect the conditions of the plaintiff’s job.”³⁰

As for hostile environment sexual harassment, Judge Flaum concurred that negligence is the appropriate standard for employer liability, in part because of the difficulties employers would face in defining actionable behavior and communicating a consistent message to employees.³¹

- Judge Cudahy principally concurred with Judge Flaum’s approach, emphasizing that a heightened standard of negligence is appropriate in supervisory hostile environment harassment cases.³²
- Judge Kanne also concurred with Judge Flaum’s opinion, while expressing reservations in two areas: (1) with regard to *quid pro quo* sexual harassment, mere threats without adverse employment consequences should be subject to a negligence standard rather than strict liability; and (2) the standard for hostile environment harassment should be a pure negligence standard without a “heightened duty of care.”³³
- Judge Posner’s lengthy dissent concurred that employer liability for hostile environment supervisory harassment should be subject to the negligence

either in discovering or remedying the harassment).

26. *Jansen*, 123 F.3d at 494-95.

27. *Id.* at 496.

28. *Id.* at 497. “[B]ecause a supervisor would be unable to engage in *quid pro quo* harassment without the authority and power furnished by the employer, the supervisor’s conduct is properly imputed to the employer.” *Id.*

29. *Id.* at 499.

30. *Id.* at 500. Thus, if the supervisor lacks apparent authority to alter the terms and conditions of the plaintiff’s workplace, vicarious liability would not be imposed on the employer. *Id.* at 500 & n.7.

31. *Id.* at 501-02.

32. *Id.* at 504.

33. *Id.* at 505-06. Note that Judge Kanne’s concern with imposing strict liability for mere threats in a *quid pro quo* case included the significantly greater litigation costs and the tendency that plaintiffs would have to turn all sexual harassment cases into “implied threats” to qualify for the easier standard. *Id.*

standard, while advocating that an additional complaint mechanism should be utilized in cases where the harasser is the supervisor.³⁴ Posner distinguished two types of *quid pro quo* harassment: (1) those situations where the supervisor uses his authority to do “a company act;” and (2) those cases where the harassment encompasses only threats.³⁵ In the former type of scenario, strict liability is appropriate because it would be a more effective deterrent than a negligence standard.³⁶ Strict liability is inappropriate in the latter type of harassment as the supervisor has not used his delegated authority to commit a company act and it would be infeasible for employers to be aware of this type of action.³⁷ The appropriate standard in the pure “threat” type of harassment is negligence.³⁸

- Judge Coffey opined that the proper standard for all supervisor sexual harassment is negligence.³⁹ Judge Coffey stated “[i]n the employment context, liability should be based on fault, and the flexible negligence standard should be used to determine an employer’s legal responsibility in Title VII sexual harassment cases, regardless of who allegedly engage[d] in the harassment (supervisor vs. co-worker) or what type of harassment allegedly occur[red] (quid pro quo vs. hostile work environment).”⁴⁰
- Judge Easterbrook and Judge Woods advocated an agency analysis applying state law.⁴¹
- Judge Manion concurred with Judge Posner’s “company act” approach to strict liability supervisor sexual harassment cases.⁴² Judge Manion advocated a three-prong test for actionable *quid pro quo* sexual harassment before strict liability would attach: (1) the unwelcome sexual advances were motivated at least in part by the plaintiff’s sex; (2) the supervisor issued an ultimatum or strong suggestion that failure to comply with the demand would result in a tangible job detriment; and (3) the plaintiff suffered a tangible job detriment.⁴³
- Judge Wood would apply agency law, “under which acts of ‘quid pro quo’

34. *Id.* at 512.

35. *Id.*

36. *Id.* For example, employers could set up mandatory levels of review for all employment decisions that alter an employee’s terms and conditions of employment.

37. *Id.* at 513-14. Posner also concluded that the cost-benefit analysis of imposing strict liability for this type of harassment weighed against strict liability. *Id.*

38. *Id.*

39. *Id.* at 518.

40. *Id.* at 546-47. Although Judge Coffey rejected the strict liability theory for supervisor harassment, he noted that the imposition of vicarious liability “might conceivably be proper in that rare situation . . . where a plaintiff is able to establish that the supervisor acted with actual or apparent authority to engage in such conduct.” *Id.* at 518.

41. *Id.* at 554, 570. This position was hotly debated by Judge Posner as unsupported and likely to result in grossly different standards from state to state. *Id.* at 506-08.

42. *Id.* at 546.

43. *Id.* at 559. Judge Manion reasoned that sexual harassment is a tort, and unless the plaintiff suffers a tangible job detriment, the tort is incomplete and no cause of action should lie. *Id.* at 560.

sexual harassment would almost always fall within the scope of the supervisor's employment and thus result in employer liability under a respondeat superior theory.⁴⁴

Thus, although the panel reached consensus on the bare standard, the divergent views of the panel leave many unanswered questions in this area to be addressed by the judiciary in the future. Unfortunately for practitioners, the lack of firm direction from the court as to the proper analytical framework will potentially result in inconsistent decisions as the district courts struggle with the proper interpretation of this decision.

D. Notice To Corporate Employers Of Sexual Harassment

Following the *Jansen* decision, the Seventh Circuit undertook the task of delineating what level of notification is required to put a corporate employer on notice of sexual harassment.⁴⁵ In *Young*, the plaintiff, a production worker, was subjected to various incidents of sexual harassment by her immediate supervisor.⁴⁶ The plaintiff complained to the department head, the harasser's immediate supervisor, at least five times.⁴⁷ Subsequently, the plaintiff complained to another supervisor, who reported the harassment to the personnel director.⁴⁸ The personnel director took some action, but the plaintiff alleged that the harassment did not stop.⁴⁹

The district court held that notice to the department head did not equate with notice to the company as he did not represent upper level management and had no responsibility to investigate charges of sexual harassment.⁵⁰ After a thorough survey of the law in other circuits on this issue, the appellate court concluded that notice should normally be given to the person who the employer has identified and who is empowered to act upon the complaint, the so called "point person."⁵¹ If the company fails to establish clear channels for complaints, the court must assess "who in the company the complainant reasonably believed was authorized to receive and forward (or respond to) a complaint of harassment."⁵²

In implementing this standard, the court found, in the instant case, that the

44. *Id.* at 565. Judge Manion concluded, and this author agrees, that Judge Woods advocated one standard for supervisory sexual harassment. Under her model, the employer would be liable any time the supervisor committed harassment during the course of his/her supervision. If outside the scope of employment, the employer would be liable if negligent in failing to address the harassment, or when the supervisor had apparent authority to take the employment actions. *Id.* at 547-48.

45. *Young v. Bayer Corp.*, 123 F.3d 672 (7th Cir. 1997).

46. *Id.* at 672.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 673.

51. *Id.* at 674.

52. *Id.*

department head would ordinarily be such a person when the complaint was lodged against someone in his chain of command.⁵³ As Judge Posner stated, “[i]f he receives such a complaint he would be obligated by elementary principles of management and good sense either to resolve the problem himself or refer it to someone else within the company, who can.”⁵⁴ Based on this reasoning, the court reversed the lower ruling and remanded the case for trial.⁵⁵ Thus, the reasonableness of the plaintiff’s decision regarding reporting will be the key inquiry in this Circuit.

E. Pregnancy Discrimination

In *Ilhardt v. Sara Lee Corp.*,⁵⁶ the Seventh Circuit affirmed summary judgment for the employer where it laid off a pregnant female part-time attorney during a reduction in force.⁵⁷ In ruling for the employer, the Seventh Circuit confirmed that the employee must show that she was treated less favorably than a nonpregnant employee under identical circumstances.⁵⁸ The plaintiff was the only part-time attorney and thus could not establish this element of the *prima facie* case.⁵⁹ Moreover, the court found that the plaintiff failed to establish that the employer’s reason, eliminating the part-time position because less work would have to be reallocated, was pretextual.⁶⁰

F. Miscellaneous Decisions

Several other decisions issued during the survey period also warrant comment:

(1) The Seventh Circuit again confirmed that stray remarks by nondecisionmakers, even when in positions of authority or coequals to the decisionmaker, do not constitute direct evidence of discrimination.⁶¹

(2) A former employee who brought a sexual harassment claim waived the psychotherapist-patient privilege when she placed her mental condition at issue

53. *Id.*

54. *Id.* at 674-75.

55. *Id.*

56. 118 F.3d 1151 (7th Cir. 1997).

57. *Id.* at 1157.

58. *Id.* at 1155 (citing *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1010 (7th Cir. 1997)).

59. *Id.*

60. *Id.*

61. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997). The Seventh Circuit also noted that the fact that the decisionmaker was of the same national origin as the plaintiff also rendered it more unlikely that the employment decision would be influenced by the other director who commented that “[a]ll Americans are stupid.” *Id.* Also note that the court discounted the plaintiff’s arguments that his favorable evaluations established that the employer’s reason for discharging him due to a failed project were pretextual, listing several reasons why an evaluation might be inflated. *Id.* at 1397-98.

by claiming emotional damages and by naming the psychotherapist as an expert witness.⁶²

(3) The Supreme Court adopted the so-called "payroll method" of calculating whether an employer has the requisite fifteen employees to be considered a covered employer under Title VII.⁶³ Thus, the employee is counted under this method regardless of whether the employee works during the week in question or is reimbursed so long as the employee remains on the employer's payroll.⁶⁴

(4) A Kansas district court recently held that firing an employee for insisting on tape recording a scheduled meeting with her supervisor was a legitimate, nondiscriminatory basis for the employment action.⁶⁵

(5) The Fifth Circuit recently overturned an \$800,000 judgment in favor of a government employee because the complainant failed to cooperate in the agency's investigation of her sexual harassment complaint.⁶⁶

II. AGE DISCRIMINATION

In a recent age discrimination case, the Seventh Circuit reaffirmed that in order to establish pretext in an age case, the employee must offer evidence "reasonably calling into question the honesty of [the employer's] belief."⁶⁷ The court reiterated that it was not within the province of the court to decide whether the reason articulated was "wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination."⁶⁸ In affirming summary judgment for the employer, the court noted that the plaintiff failed to present any record evidence that the decisionmaker's reason for the discharge decision, i.e., punching another employee, was not the honest reason for discharge.⁶⁹

III. FAIR LABOR STANDARDS ACT

Several judicial opinions refined key issues under the Fair Labor Standards Act during the survey period.

A. Use of Employer Vehicles

In *Baker v. GTE North, Inc.*,⁷⁰ the Seventh Circuit clarified that the use of an

62. *Vann v. LoneStar Steakhouse & Saloon*, 967 F. Supp. 346, 350 (C.D. Ill. 1997).

63. *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997).

64. *Id.* at 663.

65. *Hernandez v. McDonald's Corp.*, 975 F. Supp. 1418, 1428 (D. Kan. 1997).

66. *Barnes v. Levitt*, 118 F.3d 404, 407-08 (5th Cir. 1997) (stating that if "the agency does not reach the merits of the complaint because the complainant fails to comply with the administrative procedures the Court should not reach the merits either.") (citations omitted).

67. *Giannopoulos v. Brach & Brock Confections*, 109 F.3d 406, 410 (7th Cir. 1997).

68. *Id.* at 411.

69. *Id.*

70. 110 F.3d 28 (7th Cir. 1997).

employer's vehicle by an employee primarily for traveling to and from the employee's home is not compensable time if (1) the use of the vehicle for travel is within the normal commuting distance for that employer's business *and* (2) the use of the vehicle is subject to an agreement between the employer and employees or their representatives.⁷¹ The court, citing the Employee Commuting Flexibility Act of 1996,⁷² held that the requirements of normal commuting area and employee consent were satisfied, despite the fact that the truck the employees drove contained tools essential to the performance of their jobs, because the principal activity involved was commuting.⁷³

B. Notable Miscellaneous Decisions

(1) The Seventh Circuit affirmed that exempt employees do not lose their exempt status because they are subject to nonmonetary discipline for absences.⁷⁴

(2) The Supreme Court recently confirmed in a public employment case that the "mere possibility" of a deduction in pay inconsistent with salaried status does not destroy the employee's exempt status.⁷⁵ For an employee to lose exempt status, there must be "either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions."⁷⁶

(3) Following the *Auer* decision, the Ninth Circuit held that additional compensation besides salary does not destroy the employee's exempt status under the salary basis test.⁷⁷

(4) A city's one-time docking of an exempt employee's pay for a disciplinary infraction did not result in the loss of the exemptions for all employees in that category.⁷⁸ The city fell under the "window of corrections" defense where the city reimbursed the employee and changed its policy to comply with the FLSA.⁷⁹

IV. WARN ACT

Although several interesting opinions were issued during the survey period, one recent opinion merits a brief discussion. The Eighth Circuit recently held that a buyer who had tentatively agreed to purchase an ailing company but backed out at the last minute, purchasing only the equipment, was not liable to the company's employees who were terminated.⁸⁰ Because the plant closing occurred on the date of the sale, the court reasoned that the obligation never

71. *Id.* at 29.

72. Pub. L. No. 104-188, 110 Stat. 1755 (1996).

73. *Baker*, 110 F.3d at 31.

74. *Haywood v. North Am. Van Lines, Inc.*, 121 F.3d 1066, 1070 (7th Cir. 1997).

75. *Auer v. Robbins*, 117 S. Ct. 905, 910 (1997).

76. *Id.* at 911.

77. *Boykin v. Boeing Co.*, 128 F.3d 1279, 1281 (9th Cir. 1997).

78. *Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997).

79. *Id.*

80. *Burnsides v. MJ Optical*, 128 F.3d 700, 703 (8th Cir. 1997).

passed to the buyer.⁸¹ The court further held that the seller was partially protected by the “unforeseeable business circumstance” exception as the seller had exercised commercially reasonable business judgment in believing the sale would go through as originally negotiated.⁸² However, because the seller delayed notifying its employees immediately when it became aware that the sale was only an equipment purchase, the court remanded the case for a determination of damages for the relevant time period.⁸³

V. FAMILY AND MEDICAL LEAVE ACT

A. Standard of Proof In Substantive FMLA Claims

The Seventh Circuit declined to adopt the familiar *McDonnell-Douglas* burdenshifting framework in FMLA cases dealing with substantive statutory rights.⁸⁴ In a unanimous decision, the court distinguished anti-discrimination statutes from statutes which, like the FMLA, guarantee substantive rights to all employees.⁸⁵ The court held that the plaintiff’s burden of proof in a substantive FMLA claim was to establish, by a preponderance of the evidence, that the plaintiff was entitled to the benefits claimed.⁸⁶ The appellate court left open the possibility of utilizing the burden-shifting framework for retaliation claims under the FMLA.⁸⁷

After addressing the burden of proof, the court turned to the merits of the claim. In *Diaz*, the plaintiff took a month’s FMLA leave for bronchitis. One day after the plaintiff was due to report to work, he phoned from Mexico and informed the employer that he had seen a second physician who diagnosed a host of unrelated illnesses which required an additional six weeks off. The employer eventually sent a notice to the plaintiff’s last known address (pursuant to the terms of the collective bargaining agreement) requiring the plaintiff to report for a second medical examination.⁸⁸ The plaintiff failed to appear for the exam and was terminated for failure to report to work.⁸⁹ In upholding the plaintiff’s discharge, the court reasoned that an employee who “fails to cooperate with the second-opinion process . . . loses the benefit of leave After missing the appointment set for June 8, [the plaintiff] was AWOL and could not invoke the FMLA to avoid discharge.”⁹⁰

81. *Id.*

82. *Id.* at 704.

83. *Id.*

84. See *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997).

85. *Id.* at 713. Judge Easterbrook explained that “the question is not how [the employer] treated others, but whether it respected each employee’s entitlements.”

86. *Id.*

87. *Id.*

88. *Id.* at 712.

89. *Id.*

90. *Id.* at 713.

This well-reasoned opinion makes explicit the employee's obligation to cooperate with the defined FMLA procedures and the consequences for failure to comply with these mandatory obligations.

B. Sufficient Notice To Employers

Since the enactment of the FMLA, a significant issue remains largely unanswered: the extent of the employee's burden to provide the employer with sufficient notice of the need for FMLA leave, and the consequences for failing to give proper notice. Several recent decisions provide insight.

In *Carter v. Ford Motor Co.*,⁹¹ the Eighth Circuit upheld an employer's decision to terminate an employee for failure to follow company procedure for verifying the need for sick leave where the employee failed to give adequate notice of the need to take leave due to a serious health condition.⁹² In *Carter*, the plaintiff's wife reported that her husband would be out because of "family problems."⁹³ The plaintiff subsequently called in six days later and reported that he was "sick" and that the illness was "personal."⁹⁴ In reality, the plaintiff's doctor had diagnosed him with depression and concluded that he was totally disabled.⁹⁵ The Eighth Circuit ruled that the plaintiff had failed to discharge his duty to provide adequate or timely notice to the employer under the FMLA and was thus precluded from bringing an FMLA claim.⁹⁶

Similarly, the Eleventh Circuit recently concluded that when an employee deliberately withheld medical information and gave false information to the employer, the employer's inquiry notice was never triggered under the Act.⁹⁷ In *Gay*, the plaintiff was admitted to a psychiatric hospital to receive treatment for a nervous breakdown.⁹⁸ The plaintiff had been counseled for absences or tardiness on five prior occasions.⁹⁹ The plaintiff's husband admittedly lied to the employer about the reason for the plaintiff's absence and instructed their children to do the same.¹⁰⁰ Under these facts, the court held that the plaintiff failed to provide the employer adequate notice under the Act, and affirmed summary judgment for the employer.¹⁰¹

By contrast, in *Price v. City of Fort Wayne*,¹⁰² the Seventh Circuit held that filing a leave request indicating that the reason was a "medical need," and

91. 121 F.3d 1146 (8th Cir. 1997).

92. *Id.* at 1148-49.

93. *Id.* at 1147.

94. *Id.*

95. *Id.*

96. *Id.* at 1148-49.

97. *Gay v. Gilman Paper Co.*, 125 F.3d 1432 (11th Cir. 1997).

98. *Id.* at 1436.

99. *Id.* at 1433.

100. *Id.*

101. *Id.*

102. 117 F.3d 1022 (7th Cir. 1997).

attaching a doctor's note requiring the plaintiff to take the requested time off was sufficient to put the employer on inquiry notice under the Act.¹⁰³

C. Serious Health Condition

In *Murray v. Red Kap Indus., Inc.*,¹⁰⁴ the plaintiff acquired a respiratory infection, for which she was treated at a local hospital and at her private physician's office.¹⁰⁵ The plaintiff's physician released her to work after the first week of absence.¹⁰⁶ The plaintiff presented the work release to the employer on Friday of the first week indicating that she could return to work the following Monday.¹⁰⁷ Despite this release, the plaintiff failed to return to work for an additional week, claiming that she felt too sick to work.¹⁰⁸ The plaintiff was subsequently discharged pursuant to the employer's attendance policy.¹⁰⁹ In affirming the district court's judgment for the employer as a matter of law, the court held that the employee had failed to establish that she suffered from a "serious health condition" during the second week of her absence from work.¹¹⁰ The court further noted that "in order to qualify for protection under the FMLA, the employee must provide the employer with proper notice of his intention to take leave."¹¹¹ In the instant case, the employer had no information about why the plaintiff was absent for the second week, a factor which the court considered.¹¹²

VI. THE AMERICANS WITH DISABILITIES ACT

A. Disabling Treatment May Qualify as a Disability Under the ADA

In *Christian v. St. Anthony Medical Center, Inc.*,¹¹³ the Seventh Circuit expanded the definition of a disability to include necessary disabling treatment for a medical condition that may not be, by itself, disabling.¹¹⁴ *Christian* involved a plaintiff who alleged she was terminated due to hypercholesterolemia, a condition involving an excessive blood level of cholesterol.¹¹⁵ The plaintiff alleged that the employer fired her because of the expensive and disabling

103. *Id.* at 1025.

104. 124 F.3d 695 (5th Cir. 1997).

105. *Id.* at 696.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 697.

112. *Id.* at 699.

113. 117 F.3d 1051 (7th Cir. 1997).

114. *Id.* at 1052.

115. *Id.* at 1051.

monthly pheresis treatments that she would eventually be required to undergo.¹¹⁶

The Seventh Circuit held that disabling treatments for a condition that by itself is not disabling would be protected under the ADA if two criteria were met:

- (1) the disabling treatment needed to be truly necessary, and not merely an attractive option; and
- (2) an anticipated disability did not trigger a duty of accommodation if the anticipated treatment was a result of an employee's voluntary choices.¹¹⁷

Writing for the court, Judge Posner found that the plaintiff in the instant case failed to establish these requirements because the plaintiff was not actually receiving the pheresis treatments.¹¹⁸ Further, the court noted that pheresis was not the accepted method of treating high cholesterol; thus, the plaintiff also failed to establish that the treatment was truly medically necessary.¹¹⁹

B. Depression as a Disability

Recent decisions have addressed the circumstances under which depression will be considered a disability under the ADA. For example, in *Leisen v. City of Shelbyville*,¹²⁰ the district court held that a female EMT failed to establish that she was disabled under the statute due to depression where she presented no evidence that she was substantially limited in her ability to work.¹²¹

The city required all EMTs to acquire their paramedic certification within three years of initial employment as a condition of continued employment.¹²² The plaintiff failed to acquire certification within the requisite time period, allegedly due to emotional difficulties that she was experiencing in her personal life.¹²³ The plaintiff sought counseling through the employee assistance program and was treated intermittently by a counselor for two years.¹²⁴ When the city refused to extend the time frame for her certification and terminated her employment, the plaintiff brought suit alleging failure-to-accommodate under the ADA.¹²⁵

The district court initially found that the plaintiff's symptoms presented sufficient evidence to raise a genuine issue of fact as to whether the depression

116. *Id.* at 1052. Pheresis refers to a process of systematically draining the patient's blood, subjecting it to a cleansing process, and returning the cleansed blood to the patient. *Id.*

117. *Id.* To further explain the second requirement, the court noted that an employer could fire an employee because of his known propensity to engage in recklessly dangerous activities.

118. *Id.*

119. *Id.*

120. 968 F. Supp. 409 (S.D. Ind. 1997).

121. *Id.* at 416.

122. *Id.* at 414.

123. *Id.* at 414-15.

124. *Id.* at 415.

125. *Id.* at 415-16.

constituted an impairment under the Act.¹²⁶ However, the court noted that the plaintiff had no trouble functioning as an EMT and that she therefore failed to demonstrate that the alleged disability substantially limited her employment generally.¹²⁷ Thus, the plaintiff failed to establish that she was disabled under the statute and summary judgment was granted for the employer on the ADA claim.¹²⁸

In *Weigel v. Target Stores*,¹²⁹ the Seventh Circuit addressed the issue of depression as a disability in the context of whether a plaintiff who claimed to be totally disabled was a “qualified individual with a disability” under the Act. In *Weigel*, the employee asserted a total inability to work in support of her social security claim.¹³⁰ Although the court declined to regard evidence offered to the Social Security Administration as conclusive evidence of an individual’s disability under the ADA, it noted that the evidence was certainly relevant.¹³¹ As the court observed, when employees “represent that they are ‘totally disabled,’ ‘wholly unable to work,’ or some other variant to the same effect, employers and factfinders are entitled to take them at their word; and, such representations are relevant evidence of the extent of a plaintiff’s disability.”¹³²

The plaintiff also contended that her psychologist’s affidavit, which stated that “to a reasonable degree of medical certainty” the plaintiff would be able to return to work after a leave of absence, created a triable issue of fact.¹³³ In striking this argument and affirming summary judgment for the employer, the court noted that the physician’s simple assertion was too conclusory to be given any weight, citing the following Posner passage:

[A] party cannot assure himself of a trial merely by trotting out in response to a motion for summary judgment his expert’s naked conclusion about the ultimate issue To allow this would be to confuse admissibility with weight and to disregard the judge-crafted limitations on the admissibility of expert testimony. The fact that a party opposing summary judgment has some admissible evidence does not preclude summary judgment To put this differently, an expert’s opinion based on ‘unsupported assumptions’ and ‘theoretical speculations’ is no bar to summary judgment.¹³⁴

Thus, the fact that the plaintiff claimed to be totally unable to work ultimately resulted in a finding that the plaintiff could not establish that she was a qualified

126. *Id.* at 416.

127. *Id.*

128. *Id.* at 417.

129. 122 F.3d 461 (7th Cir. 1997).

130. *Id.* at 463.

131. *Id.* at 466.

132. *Id.* at 467.

133. *Id.* at 468.

134. *Id.* at 469 (citing *American Int’l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1464 (7th Cir. 1996)).

individual with a disability under the Act.

C. Cause Of Action Accrues At The Time Of The Discriminatory Act

In *Huels v. Exxon Coal USA, Inc.*,¹³⁵ a plaintiff who suffered from alcoholism experienced a lay-off when the employer implemented a reduction in force due to a contractual dispute with a major customer.¹³⁶ Prior to the lay-off at issue, the company completed a forced ranking of its employees, resulting in the plaintiff being ranked at the bottom of the list.¹³⁷ Both the lay-off and subsequent recalls were based upon the rankings.¹³⁸ Because the initial ranking occurred prior to the effective date of the ADA, the plaintiff attempted unsuccessfully to argue that he was subject to a continuing violation, including the lay-off and failure to recall.¹³⁹

The Seventh Circuit affirmed summary judgment for the employer, holding that the sole discriminatory act—the forced ranking—was the point at which the cause of action accrued.¹⁴⁰

VII. OSHA/IOSHA DEVELOPMENTS

Although the survey period was relatively quiet, there were a few significant decisions regarding occupational safety and health.

A. “Knowing Violations” Under Indiana Law

The Indiana Supreme Court declined to accept transfer in *Union Tank Car v. Commissioner of Labor*,¹⁴¹ leaving intact the definition of a “knowing” violation as previously defined in *Commissioner of Labor v. Gary Steel Products Corp.*¹⁴² Thus, under current Indiana law, to prove a “knowing,” violation, the Department of Labor is required to demonstrate that the employer “acted voluntarily, with either an intentional disregard of, or plain indifference to, its employees.”¹⁴³ The appellate court rejected the employer’s argument that a knowing violation requires an element of malice to differentiate it from a serious violation.¹⁴⁴ In a thoughtful dissent, Judge Friedlander questioned the majority’s distinction between “knowing” violations and “serious” violations, noting that in his view, the element of malice is the element that elevates a serious violation to the level of a knowing violation.¹⁴⁵

135. 121 F.3d 1047 (7th Cir. 1997).

136. *Id.* at 1048.

137. *Id.*

138. *Id.* at 1048-49.

139. *Id.*

140. *Id.* at 1051.

141. 671 N.E.2d 885 (Ind. Ct. App. 1996), *trans. denied*, 683 N.E.2d 585 (Ind. 1997).

142. 643 N.E.2d 407, 411 (Ind. Ct. App. 1994).

143. *Union Tank Car*, 671 N.E.2d at 890.

144. *Id.* at 892.

145. *Id.*

B. Ergonomic Injuries Under The General Duty Clause

In a case of first impression, the Occupational Safety and Health Review Commission has held that an employer may be cited under the general duty clause for an ergonomics violation.¹⁴⁶ The decision resulted from an inspection of a Pennsylvania facility which produced cookies and other baked goods.¹⁴⁷ OSHA cited Pepperidge Farms for numerous alleged willful violations involving repetitive motion injuries and lifting hazards, as well as numerous deficient record keeping citations.¹⁴⁸ The proposed penalties were cited under the "egregious" case by case penalty policy and approached \$1,400,000.00.¹⁴⁹ Although the Commission found that a general duty clause violation could be brought, the majority opinion vacated the willful repetitive injury citations because the Commissioner failed to identify acceptable feasible methods of abatement.¹⁵⁰ Commissioner Montoya dissented, finding that repetitive motion injuries were not a hazard within the meaning of the general duty clause.¹⁵¹ Thus, although the Commission has upheld citing employers under the General Duty Clause for repetitive motion injuries, it remains to be seen how frequently or successfully this type of citation will be utilized.

C. The Basis For General Duty Clause Citations

The Fifth Circuit, in *Metzler v. Arcadian Corporation*,¹⁵² upheld the Commission's ruling that the proper unit of prosecution under the General Duty Clause is the hazard, not a per-employee basis as advanced by the Secretary.¹⁵³ *Metzler* involved an explosion at a fertilizer manufacturing plant which potentially exposed eighty-seven employees to work hazards.¹⁵⁴ The Secretary argued that the General Duty Clause allowed OSHA to issue a citation for each employee exposed to the alleged hazard, and proposed penalties of \$50,000 per employee or over \$4 million.¹⁵⁵ The court concluded that the General Duty Clause was not ambiguous and provided that the violative condition was the proper unit of prosecution based upon three criteria: (1) the plain meaning of preventing "recognized hazards" that "may cause death or serious physical harm to . . . employees"; (2) the penalty clause which states that an employer may not be assessed more than \$70,000 per violation; and (3) the exclusive authority of the Commission to assess penalties once assessed by the Secretary and

146. Pepperidge Farm, Inc., No. 89-265, 1997 OSAHRC LEXIS 40, at *4 (Apr. 26, 1997).

147. *Id.* at *1.

148. *Id.*

149. *Id.*

150. *Id.* at *190.

151. *Id.* at *239.

152. No. 96-60126, 1997 U.S. App. LEXIS 12693 (5th Cir. Apr. 28, 1997).

153. *Id.* at *2.

154. *Id.*

155. *Id.* at *3.

subsequently challenged.¹⁵⁶ This well-reasoned decision challenges a long-standing practice of the agency and is consistent with the statutory language of the Occupational Safety and Health Act.

D. Abatement Certification

OSHA's new abatement certification rule amended prior law by adding a new section detailing the abatement certification requirement.¹⁵⁷ The new rule became effective on May 30, 1997, and requires the employer to provide written certification within ten calendar days following the abatement date specified in the citation.¹⁵⁸ Employees and/or their representatives must also be notified of the abatement by posting the abatement letter for three working days at or near the site of the violation.¹⁵⁹

E. Personal Protective Equipment

In *Union Tank Car Company*,¹⁶⁰ the Commission overruled the Secretary's position that employers must bear the cost of furnishing personal protective equipment to their employees.¹⁶¹ Citing the regulatory language and the history of previous letters of interpretation from OSHA over the last twenty years, the Commission noted that the regulations do not address this issue, and the matter has historically been left to negotiations between the employer and its employees.¹⁶² The citation was thus vacated against the employer.¹⁶³

VIII. STATE LEGISLATIVE DEVELOPMENTS

A. New Employer Reporting Requirements

The New Hire Directory went into effect on October 1, 1997.¹⁶⁴ The statute requires all employers to submit identifying information to the Indiana Department of Workforce Development within twenty days of a new employee's hire date.¹⁶⁵ The information will be used to assist in the enforcement of child support obligations and to match unemployment insurance and worker's compensation records to verify eligibility for these programs.¹⁶⁶ The employer may comply with the new requirements by submitting the employee's W-4 form

156. *Id.* at *12-23.

157. 29 C.F.R. § 1903.19 (1997).

158. 29 C.F.R. § 1903.19(c) (1997).

159. 29 C.F.R. § 1903.19(g) (1997).

160. No. 96-0563, 1997 OSAHRC LEXIS 104 (Oct. 16, 1997).

161. *Id.* at *12.

162. *Id.* at *5.

163. *Id.* at *12.

164. 42 U.S.C.A. § 653a (West Supp. 1998); IND. CODE § 22-4.1-4-2 (Supp. 1997).

165. IND. CODE § 22-4.1-4-2(g)(1) (Supp. 1997).

166. 42 U.S.C.A. § 653a (West Supp. 1998).

or by utilizing the new alternative W-4 form, which is scannable.¹⁶⁷ Employers have several options regarding the method of reporting the information.¹⁶⁸ An employer that has employees in two or more states and that transmits the reports electronically may designate one state in which to report new hires.¹⁶⁹

IX. SIGNIFICANT INDIANA DECISIONS

A. At-Will Employment

In *Orr v. Westminster Village North, Inc.*,¹⁷⁰ the Indiana Supreme Court recently reversed the Indiana Court of Appeals and reaffirmed that the employment-at-will doctrine is alive and well in Indiana.¹⁷¹ In a unanimous opinion, the court declined to abolish the rule that requires an employee to give independent consideration to convert an employment-at-will relationship into a “just-cause termination” relationship.¹⁷² The court wrote, “[I]n Indiana, the presumption of at-will employment is strong, and this Court is disinclined to adopt broad and ill-defined exceptions to the employment-at-will-doctrine.”¹⁷³ The court added, “[W]e decline plaintiffs’ invitation to construe employee handbooks as unilateral contracts and to adopt a broad new exception to the at-will doctrine of such handbooks.”¹⁷⁴ The court also noted that, even if such an exception were considered, the employee handbook at issue was insufficient to avoid at-will employment.¹⁷⁵

The employer in *Orr* discharged several employees for being in an unauthorized area and for endangering safety and life as described in the employee handbook.¹⁷⁶ The employees challenged their discharge because the employer failed to follow the disciplinary procedure outlined in the handbook.¹⁷⁷

The handbook contained the following significant sections:

- Rules of Employee Conduct which expressly stated that the list was not exclusive;
- A progressive discipline policy expressly stating that the employer could deviate from the normal progressive discipline format in serious situations;
- A grievance procedure providing employees with a mechanism to appeal adverse decisions; and

167. IND. CODE § 22-4.1-4-2(h) (Supp. 1997).

168. *Id.*

169. *Id.* § 22-4.1-4-2(i).

170. 689 N.E.2d 712 (Ind. 1997).

171. *Id.* at 714.

172. *Id.*

173. *Id.* at 717.

174. *Id.* at 722.

175. *Id.*

176. *Id.* at 715.

177. *Id.*

- An express disclaimer stating that the handbook was not a contract and was subject to change as well as an acknowledgment form further emphasizing that the handbook was not a contract.¹⁷⁸

Reviewing these provisions, the court held that the handbook “does not constitute a clear offer supporting a binding unilateral contract because its language regarding progressive discipline procedures is suggestive rather than mandatory, and because the handbook includes a prominent disclaimer and was accompanied by a second disclaimer, which is referenced in the handbook and was signed by plaintiffs.”¹⁷⁹

Orr teaches that a handbook containing prominent disclaimers and permissive language giving employers broad discretion, along with an acknowledgment form stating that the handbook is not a contract, will not be construed as a unilateral contract in Indiana. This case should be read by all Indiana practitioners as the court clearly delineates the three exceptions to the employment at-will doctrine in Indiana: namely, (1) adequate independent consideration supporting the employment contract; (2) a clear contravention of a statutory right or duty; or (3) promissory estoppel.¹⁸⁰

B. Threatening A Co-Worker Constitutes Just Cause For Discharge

In a 2-1 decision, the Indiana Court of Appeals held that threatening a co-worker could constitute just cause for discharge, despite the presence of an employment contract.¹⁸¹ In *McQueary*, a school bus driver admittedly told a co-worker to get off his bus or he would “put him under.”¹⁸² The majority opinion held that this admitted statement constituted evidence of the employee’s threat to kill a co-worker, and reversed the trial court’s denial of summary judgment for the employer.¹⁸³

C. Severance Pay Which Is Not Based On Work Performed Does Not Constitute Wages

In an unpublished opinion, the Indiana Court of Appeals recently held that an employee could not recover treble damages under Indiana’s wage statute¹⁸⁴ for failure to pay a severance package that was not based upon work done by the employee.¹⁸⁵ In reversing the trial court’s decision and award, the court declined

178. *Id.* at 716-17.

179. *Id.* at 722.

180. *Id.* at 717.

181. Kokomo Ctr. Township Consol. Sch. Corp. v. McQueary, 682 N.E.2d 1305, 1306 (Ind. Ct. App. 1997).

182. *Id.* at 1306.

183. *Id.* at 1306-07.

184. IND. CODE § 22-2-5-2 (1993).

185. Sun-Gard U.S.A., Inc. v. Stevens, 683 N.E.2d 650 (Ind. Ct. App. 1997) (unpublished memorandum decision).

to broaden the restrictive definition of wages under the statute, and held that the severance pay in the instant case did not constitute wages.¹⁸⁶

D. Bonuses Based Upon Company Performance Do Not Constitute Wages

Similarly, a federal court decision recently clarified that an employee's bonus, when based upon company performance and not the individual's performance, does not constitute wages within the meaning of Indiana's wage statute.¹⁸⁷ In granting summary judgment for the employer, the court relied upon the following facts:

- The bonus was not tied to or calculated from the plaintiff's salary or commissions;¹⁸⁸
- The bonus in question was related to the overall performance of the bank branch;¹⁸⁹
- The bonus was not paid on a periodic, regular basis as the bonus amount could only be calculated at the end of the fiscal year.¹⁹⁰

X. WORKER'S COMPENSATION

Several key issues were addressed during the survey period that warrant a brief comment.

A. The Board's Authority To Enter Orders That Are Not Completely Dispositive

In responding to a certified question from the United States District Court, Southern District of Indiana, the Indiana Supreme Court held that the Board may issue enforceable and appealable determinations regarding the termination of temporary total disability benefits and the reasonableness of medical care.¹⁹¹ The court also ruled that while the Board has the authority to rule on other limited issues, such as the compensability of a claim, the order would not become appealable until the order became a predicate of an award.¹⁹²

The action at issue involved a class of injured workers not able to obtain benefits because their injuries had not reached the state of maximum medical improvement, or "quiescence."¹⁹³ The Worker's Compensation Board historically had not issued decisions which disposed of less than all the issues between the parties, based on the belief that the decision would not be subject to

186. *Id.*

187. *Phenicie v. Bossert Indus. Supply, Inc.*, 963 F. Supp. 747, 751 (N.D. Ind. 1996).

188. *Id.* at 751.

189. *Id.* at 752.

190. *Id.* at 753.

191. *Cox v. Worker's Compensation Bd.*, 675 N.E.2d 1053, 1059-60 (Ind. 1996).

192. *Id.*

193. *Id.* at 1054.

judicial review.¹⁹⁴ The court held that the Board had explicit power to issue decisions regarding the termination of temporary disability benefits.¹⁹⁵ In concluding that the decision regarding the termination of benefits constituted an "award" under the Act, and was therefore enforceable and appealable, the court noted that the purposes of the Act were to be construed liberally.¹⁹⁶ The court used similar reasoning to conclude that the award of necessary medical benefits under the Act would also be construed as an "award" if incorporated into an order directing medical treatment or compensation.¹⁹⁷ Finally, the court concluded that nothing in the statute prevented the Board from ruling on other limited issues such as the compensability of the claim.¹⁹⁸ However, until the ruling resulted in an award, the ruling would not be immediately appealable.¹⁹⁹ This opinion gives the Board broad discretion to issue orders regarding limited issues in dispute in order to effectuate the purposes of the statute.

B. Premature Filing Of Application For Review

In *Jackson v. CIGNA/Ford Electronics & Refrigeration Corp.*,²⁰⁰ the appellate court addressed an issue of first impression: whether the premature filing of an application for review satisfies the filing requirements under Indiana law.²⁰¹ The case involved a *pro se* plaintiff who contested the discontinuation of temporary total disability benefits.²⁰² On the day following the hearing, and roughly four months prior to the issuance of the order and award, the claimant filed a letter requesting a hearing before the full Board and entering an appeal against any ruling the hearing officer might make.²⁰³ The full Board treated the appeal as untimely.²⁰⁴ In reversing the Board's decision, the appellate court looked to the statutory purpose, which was to obtain the "speedy disposal of a claim" and to provide notice to the other party.²⁰⁵

CONCLUSION

This survey period reflected both clarification and refinement in numerous areas of employment law. On the state level, the Indiana Supreme Court

194. *Id.*

195. *Id.* at 1056.

196. *Id.* at 1057.

197. *Id.* at 1058-59.

198. *Id.*

199. *Id.*

200. 677 N.E.2d 1098 (Ind. Ct. App. 1997).

201. *Id.* at 1100.

202. *Id.* at 1099.

203. *Id.*

204. *Id.*

205. *Id.* at 1102. Note that the statutory language in question states that an application for review is to be made "within twenty (20) days from the date of the award made by less than all the members." IND. CODE § 22-3-4-7 (1993).

revitalized the employment at-will doctrine in Indiana. Due to the overall increase in employment litigation that has been experienced, new issues will likely continue to develop as the boundaries of the various employment laws are challenged.

SURVEY OF RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

SEAN P. O'BRIEN*

INTRODUCTION

This survey nominally covers cases decided between October 1, 1996, and October 1, 1997. However, some of the cases discussed will fall outside of that period. Indiana appellate courts handed down many important decisions this past year. As in past years, the organization of this survey will mirror that of the Indiana Rules of Evidence.

I. MISCELLANEOUS EVIDENCE ISSUES

A. Circumstantial Evidence in Criminal Cases

In the space of a little over a year, the Indiana Supreme Court issued two inconsistent opinions concerning circumstantial evidence and the burden of proof in criminal cases. In *Lloyd v. State*,¹ the court determined that a defendant is entitled to a jury instruction “requiring [the jury to find] the exclusion of every reasonable hypothesis of [the defendant’s] innocence when the evidence is purely circumstantial” before convicting the defendant.² In *Saylor v. State*,³ the court stated, “When a verdict rests on circumstantial evidence, this Court need not find that the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but only that inferences may reasonably be drawn to enable the jury to find guilt beyond a reasonable doubt.”⁴ These cases are irreconcilable,⁵ and they have the potential to cause confusion, particularly because *Saylor* (the later decided of the two) does not mention *Lloyd*. In the

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1. 669 N.E.2d 980 (Ind. 1996).
2. *Id.* at 985 (citing *Nichols v. State* 591 N.E.2d 134 (Ind. 1992)); *see also Cox v. State*, 475 N.E.2d 664, 667 (Ind. 1985); *Cantrell v. State*, 673 N.E.2d 816, 819 (Ind. Ct. App. 1996); *McDonald v. State*, 547 N.E.2d 294, 296-97 (Ind. Ct. App. 1989).
3. 686 N.E.2d 80 (Ind. 1997).
4. *Id.* at 84; *see also Fox v. State*, 560 N.E.2d 648, 654 (Ind. 1990); *Washington v. State*, 685 N.E.2d 724, 728 (Ind. Ct. App. 1997); *Jernigan v. State*, 612 N.E.2d 609, 613 (Ind. Ct. App. 1993).

5. The cases do have a somewhat different posture. *Lloyd* involved a claim that a defense attorney’s failure to request the instruction constituted ineffective representation of counsel, and *Saylor* involved the defendant’s claim that the evidence did not support the verdict. The difference is of no consequence. A defendant is only entitled to an instruction that accurately states the law. *See Battles v. State*, 688 N.E.2d 1230, 1232 (Ind. 1997); *Abdul-Musawwir v. State*, 674 N.E.2d 972, 974 (Ind. Ct. App. 1996). Therefore, the question posed to both courts was the same.

author's opinion, the rule in *Saylor* is sounder because it better reflects an appellate court's deference to the jury's role as the finder of fact.⁶ Regardless of whether the evidence supporting the verdict of guilt is direct, circumstantial or both, the test for whether the evidence is sufficient to support the conviction should be: Could the jury have reasonably found guilt beyond reasonable doubt from the evidence and all reasonable inferences drawn therefrom?⁷ Circumstantial evidence is not inherently less or more reliable than direct evidence;⁸ therefore, appellate courts should review verdicts supported solely by circumstantial evidence by the same standard as verdicts supported by direct evidence.

B. Admissibility of Evidence that "Another Guy Did It" in Criminal Cases

In *Joyner v. State*,⁹ the court evaluated a defendant's claim that the trial court improperly excluded evidence tending to show that another person committed the murder for which the defendant was on trial. Under the rule established in *Burdine v. State*,¹⁰ evidence demonstrating that a third party committed the charged crime must "directly connect the third party to the crime."¹¹ Rather than following *Burdine*, the *Joyner* court declared, "[O]ur review is guided by the Indiana Rules of Evidence. . . ."¹² The court then found that the proffered evidence met the logical relevance test of Rule 401: "Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"¹³ In *Joyner*, a good deal of evidence suggested that

6. Some jurisdictions follow the rule espoused in *Lloyd*. See, e.g., *Roper v. State*, 429 S.E.2d 668, 669 (Ga. 1993); *State v. Moore*, 880 P.2d 238, 241 (Idaho 1994); *State v. Duguay*, 698 A.2d 5, 8 (N.H. 1997) (applying the rule to each *element* of offense); *State v. Breed*, 399 N.W.2d 311, 312-13 (S.D. 1987) (holding failure to give instruction *fundamental* error). Other jurisdictions follow the rule in *Saylor*. See, e.g., *United States v. Armstrong*, 16 F.3d 289, 292 (8th Cir. 1994); *Commonwealth v. Merola*, 542 A.2d 249, 252-53 (Mass. 1989); *State v. Jenks*, 574 N.E.2d 492, 498 (Ohio 1991). See generally Carroll J. Miller, Annotation, *Modern Status of Rule Regarding Necessity of Instruction on Circumstantial Evidence in Criminal Trial—State Cases*, 36 A.L.R.4TH 1046 (1981 & Supp. 1997).

7. See *Holland v. United States*, 348 U.S. 121, 139-40 (1954); *Dirring v. United States*, 328 F.2d 512, 515 (1st Cir. 1964). But cf. *United States v. Braxton*, 877 F.2d 556, 562-63 (7th Cir. 1989) (instruction similar to that in *Lloyd* permissible but not required).

8. See *United States v. O'Brien*, 119 F.3d 523, 533 (7th Cir. 1997); *Broecker v. State*, 314 N.E.2d 428, 431 (Ind. App. 1974); *State v. Sanborn*, 564 N.W.2d 813, 816 (Iowa 1997); *Commonwealth v. Dostie*, 681 N.E.2d 282, 284 (Mass. 1997); *Sutherland v. State*, 944 P.2d 1157, 1161 (Wyo. 1997).

9. 678 N.E.2d 386 (Ind. 1997).

10. 515 N.E.2d 1085 (Ind. 1987).

11. *Id.* at 1094 (citing *Brown v. State*, 416 N.E.2d 828 (Ind. 1981)).

12. *Joyner*, 678 N.E.2d at 389.

13. *Id.* (quoting IND. R. EVID. 401).

another person committed the murder in question. The trial court improperly excluded this evidence.¹⁴ Because this was not harmless error, the *Joyner* court remanded for a new trial.

C. Standard of Review

In general, Indiana appellate courts review the admissibility of evidence on an abuse of discretion standard. This standard is used even when the question is a purely legal one.¹⁵ One case, *Stahl v. State*,¹⁶ broke from that general rule. In *Stahl*, the Indiana Supreme Court evaluated the admissibility of certain hearsay evidence. The *Stahl* court rejected the abuse of discretion standard of review.¹⁷

Stahl is interesting because the court examines the nature of the question before the appellate court in determining the admissibility of evidence. Where legal questions are at issue, no deference should be afforded to the trial court. Often, evidentiary issues are questions of law. Consequently, the “one size fits all” abuse of discretion standard of review may be inappropriate in many cases.

D. Polygraph Evidence

In *Sanchez v. State*,¹⁸ the court reviewed the defendant’s contention that the trial court failed to instruct the jury on its consideration of polygraph evidence. At trial, the defendant did not tender an instruction on this subject. In evaluating

14. *Id.* at 390.

15. See, e.g., *Heavrin v. State*, 675 N.E.2d 1075, 1083 (Ind. 1996) (Rule 404(b)); *State v. Eaton*, 659 N.E.2d 232, 236 (Ind. Ct. App. 1995) (determination of logical relevance); *Bates v. State*, 650 N.E.2d 754, 757 (Ind. Ct. App. 1995). See also Tammy J. Meyer & Dina M. Cox, *Recent Developments in Indiana Tort Law*, 30 IND. L. REV. 1317, 1319 (1997) (criticizing *Eaton*); Edward F. Harney & Jennifer Markavitch, *1995 Survey of Indiana Evidence Law*, 29 IND. L. REV. 887, 891 n.41 (1996) (criticizing *Bates*). *Heavrin* merits additional discussion. Obviously, evidence admitted under Rule 404(b) will have to satisfy Rule 403. A trial court’s decision under Rule 403 is reviewed for an abuse of discretion. However, the question of whether evidence violates Rule 404(b) (without reference to Rule 403) is a question of law. See *United States v. Merriweather*, 78 F.3d 1070, 1074 (6th Cir. 1996). As a practical matter, though, the *Heavrin* approach causes little difficulty.

16. 686 N.E.2d 89 (Ind. 1997).

17.

Our standard of review of a trial court’s findings as to the essential elements of admissibility is sometimes described as an abuse of discretion. Because the predicates or foundational requirements to admissibility often require factual determinations by the trial court, these findings are entitled to the same deference on appeal as any other factual finding, whether that is described as a “clearly erroneous” or abuse of discretion standard. However, the ultimate question in this case is the interpretation of the language of a rule of evidence that presents a question of law for this Court.

Id. at 91 (citations omitted).

18. 675 N.E.2d 306 (Ind. 1996).

the defendant's contention, the court first reiterated four prerequisites for the admission of polygraph evidence.¹⁹ The court then focused on the failure to instruct the jury. The court held that, because the defendant had waived the issue by not tendering an instruction and the failure to instruct was not fundamental error, reversal was not warranted.²⁰

Sanchez is significant for two reasons: 1) it reaffirms prior case law (i.e., pre-Rules case law) on this issue, and 2) it applies a fundamental error standard to at least one of the prerequisites to the admission of polygraph evidence. Therefore, in most cases, procedural missteps with respect to this evidence likely will not be deemed fundamental error. *Sanchez* also provides an excellent discussion of the difference between fundamental errors and errors that require objection to be preserved for appeal.²¹

E. The Doctrine of Completeness

In *Stanage v. State*,²² the court dealt with the doctrine of completeness as incorporated into Rule 106.²³ In *Stanage*, redacted portions of the defendant's videotaped statement were admitted as impeachment evidence. The defendant moved to admit the entire videotaped statement. The trial court denied the defendant's request because the videotape contained portions prejudicial to the defendant. The *Stanage* court held that the trial court properly denied the defendant's request because "[i]mmaterial, irrelevant or prejudicial material must be redacted from the portions of the statements which are admitted."²⁴

As a general rule, the holding in *Stanage* is unobjectionable, but in this case it seems to be at odds with traditional notions of the adversarial system. Usually, a trial court should not be concerned with the possibility of prejudice to the party seeking to admit evidence. In this case, it was for the defendant's attorney to

19.

1) that the prosecutor, defendant, and defense counsel all sign a written stipulation providing for the defendant's submission to the examination and for the subsequent admission at trial of the results; 2) that notwithstanding the stipulation, the admissibility of the test results is at the trial court's discretion regarding the examiner's qualifications and the test conditions; 3) that the opposing party shall have the right to cross-examine the polygraph examiner if his graphs and opinions are offered into evidence; and 4) that the jury be instructed that, at most, the examiner's testimony tends only to show whether the defendant was being truthful at the time of the examination and that it is for the jury to determine the weight and effect to be given such testimony.

Id. at 308 (citing *Davidson v. State*, 558 N.E.2d 1077, 1085 (Ind. 1990)).

20. *Id.* at 308-09.

21. *Id.*

22. 674 N.E.2d 214 (Ind. Ct. App. 1996).

23. "When a writing or a recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered." IND. R. EVID. 106.

24. *Stanage*, 674 N.E.2d at 216 (citing *Evans v. State*, 643 N.E.2d 877, 881 (Ind. 1994)).

calculate the prejudice to his client when he asked the trial court to admit the rest of the videotape. Also, the defendant would not have been able to claim prejudice on appeal—a party who invites error will not be heard to complain of that error on appeal. The defendant therefore should have been allowed to have the jury pass on the redacted portions of the videotape.²⁵

II. JUDICIAL NOTICE

In *Mayo v. State*,²⁶ a defendant argued that there was no evidence from which the jury could conclude that one of his prior convictions (for escape) was a felony for purposes of Indiana's habitual offender statute.²⁷ In finding that there was "no error on this issue,"²⁸ the court took judicial notice that the escape conviction constituted a felony under Indiana's habitual offender statute. This was incorrect.

First, the court treated the issue of whether the escape conviction constituted a felony as one of law.²⁹ Although this is a natural conclusion (after all, a person can simply look up the sentence for escape in the Alabama Code), it is not a correct one. In order to adjudge a person a habitual offender, a trier of fact must find that the person committed two previous felonies.³⁰ Therefore, the issue of whether the convictions constituted felonies was a question of fact, not a question of law.

Second, the court ignored Rule 201(g), which provides: "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."³¹ A habitual offender proceeding is clearly "a criminal case." This means that the taking of judicial notice of adjudicative facts (but not legislative facts³²) is improper on appeal because the jury, discharged after the trial, would have no opportunity to pass on the fact judicially noticed.³³ The jury has the power to refuse to find indisputable facts.

25. Cf. *Humphrey v. State*, 680 N.E.2d 836, 839-40 (Ind. 1997) (decision whether to request limiting admonition is best left to party against whom evidence is offered).

26. 681 N.E.2d 689 (Ind. 1997).

27. IND. CODE § 35-50-2-1(b) (1993) (defining felony conviction for purposes of the statute).

28. *Mayo*, 681 N.E.2d at 693.

29. *Id.* (citing IND. R. EVID. 201(b), which allows a court to take judicial notice of the law of any state).

30. IND. CODE § 35-50-2-8(d) (Supp. 1997).

31. IND. R. EVID. 201(g).

32. See *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976). In *Gould*, the court held that a court may take judicial notice of a legislative fact in a criminal case without instructing the jury that it could reject that fact. *Id.* at 221; see also *United States v. Hernandez-Fundora*, 58 F.3d 802, 811-12 (2d Cir. 1995) (discussing difference between legislative and adjudicative facts).

33. See *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978) (holding that the appellate court could not cure a lack of proof that telephone company was a common carrier engaged in interstate commerce by taking judicial notice on appeal).

It is of no consequence that the jury in *Mayo* adjudged the defendant a habitual offender. It did so on insufficient evidence; therefore, that adjudication cannot stand. The jury's determination cannot subsequently be made valid by the taking of judicial notice on appeal. Defendants have a statutory right to have a jury pass on whether they are habitual offenders.³⁴ This means that the prosecution must put forth sufficient evidence from which the jury can determine beyond a reasonable doubt that a particular defendant is a habitual offender. If the prosecution does not (and just like any other criminal case where there is insufficient evidence to support a verdict of guilt) do so, the defendant cannot be adjudged a habitual offender. Restated, the prosecution has to make the proper case to the jury, and an appellate court should not make the prosecution's case on appeal.

It is very unlikely that anyone will be too troubled by this result. The defendant in *Mayo* was convicted of a brutal crime. Moreover, had the court vacated the habitual offender adjudication, it would have done so on a so-called technicality. That said, the *Mayo* decision is contrary to law and ought not stand.

III. ARTICLE IV

A. Rule 404(b)

Because Rule 404(b) is so often an issue (particularly in criminal cases) there are many appellate decisions construing the rule. This has unfortunately produced a lack of uniformity in the rule's application.

At the end of the survey period, the Indiana Supreme Court decided *Goodner v. State*,³⁵ which effectively overruled a line of court of appeals decisions. In *Goodner*, the Indiana Supreme Court reaffirmed *Wickizer v. State*³⁶ and its approach to evidence admitted under the "intent exception" to Rule 404(b).³⁷ However, the *Goodner* court rejected the *Wickizer* approach to evidence admitted under other "exceptions" to Rule 404(b).³⁸

In *Wickizer*, the court held that "[t]he intent exception in Evid.R.404(b) will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent."³⁹ Various panels of the court of appeals had applied this approach to *all* of Rule 404(b)'s listed purposes.⁴⁰ *Goodner* has put an end to the application of the

34. IND. CODE § 35-50-2-8(d) (Supp. 1997).

35. 685 N.E.2d 1058 (Ind. 1997).

36. 626 N.E.2d 795 (Ind. 1993).

37. *Goodner*, 685 N.E.2d at 1061.

38. *Id.* at 1061 n.3.

39. *Wickizer*, 626 N.E.2d at 799; *see also* *Smith v. State*, 678 N.E.2d 1152, 1157 (Ind. Ct. App. 1997) (following *Wickizer*).

40. *See Sundling v. State*, 679 N.E.2d 988, 993 (Ind. Ct. App. 1997); *Reynolds v. State*, 651 N.E.2d 313, 316 (Ind. Ct. App. 1995); *Bolin v. State*, 634 N.E.2d 546, 550 (Ind. Ct. App. 1994);

Wickizer approach to the other listed purposes in Rule 404(b). Accordingly, cases doing so should not be considered accurate statements of the law.

However, the *Goodner* opinion contains some errors in its analysis. First, the court refers to an "intent exception."⁴¹ This is incorrect.⁴² There are no exceptions to Rule 404(b): the rule flatly bars the use of other acts evidence to prove action in conformity therewith.⁴³ Inasmuch as courts admit other acts evidence to prove intent, motive, et al., the evidence is not admitted under an exception to Rule 404(b). This, however, is not a major concern, in large part because the list of "exceptions" to Rule 404(b) is neither exclusive nor exhaustive.⁴⁴ Therefore, the admissibility of other acts evidence is not tied to the offeror's ability to shoehorn the evidence into one of Rule 404(b)'s listed purposes.⁴⁵

cf. Carson v. State, 659 N.E.2d 216, 219 (Ind. Ct. App. 1995) (rejecting broad interpretation of motive "exception"); *Moore v. State*, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995) (court distrustful of evidence offered to prove motive).

41. *Goodner*, 685 N.E.2d at 1061.

42. See Jeffrey O. Cooper, *Recent Developments Under the Indiana Rules of Evidence*, 30 IND. L. REV. 1049, 1051 n.14 (1997). Professor Cooper's Survey contains an excellent analysis of some Rule 404(b) cases; *see also Lay v. State*, 659 N.E.2d. 1005 (Ind. 1995). In that case, Justice Sullivan correctly observes that it is incorrect to refer to Rule 404(b) exceptions because Rule 404(b) is a rule of inclusion. *Id.* at 1010 n.5.

43. The heading of Rule 404 contains a reference to exceptions. The exceptions, however, are to Rule 404(a), not to Rule 404(b).

44. See *Hardin v. State*, 611 N.E.2d 123, 129 (Ind. 1993); *see also Ross v. State*, 676 N.E.2d 339, 346 (Ind. 1996) (relationship between victim and defendant is a proper purpose under Rule 404(b)).

45. Focusing on the enumerated purposes may have the effect of improperly shifting the inquiry away from whether the other acts evidence constitutes character evidence. For example, if the other acts evidence is offered to prove motive, then the court may simply ask whether the evidence is probative of motive without asking whether the evidence is mere character evidence barred by Rule 404(b). In those cases, slogans may substitute for analysis.

This occurred in *Tompkins v. State*, 669 N.E.2d 394 (Ind. 1996). In *Tompkins*, the Indiana Supreme Court held that certain other acts evidence showing a white defendant's racism was probative of his motive in the brutal murder of a black victim. *Id.* at 398. There is little doubt that this conclusion was correct; certainly, this evidence demonstrated a motive for the crime. However, the court did not analyze whether the evidence was mere character evidence. (Mere character evidence may be characterized as motive—a racist and violent character can definitely show motive. That, however, does not make the evidence admissible.) In that respect, the *Tompkins* court erred. The *Tompkins* court stated that certain evidence "show[ed] a desire to engage in violence towards African-Americans." This sounds awfully close to an inference of propensity, which is barred by Rule 404(b). *Tompkins* was aptly criticized by Professor Cooper in last year's survey. Cooper, *supra* note 42, at 1052-55.

The real problem with *Tompkins* is that it confuses logical relevance with legal relevance. This exemplifies the danger of other acts evidence. Often, the inference of bad conduct from bad character is extremely obvious and compelling. Certainly, the actions of the defendant in *Tompkins*

Second, and more importantly, the *Gardner* court should not have reaffirmed *Wickizer* because *Wickizer* is fundamentally flawed and should be abandoned. The *Wickizer* court was rightly concerned about the dangers⁴⁶ of other acts evidence, particularly other acts evidence offered as probative of intent. Accordingly, the court held that other acts evidence offered to prove intent will only be permitted if the defendant goes beyond merely denying the crime charged but claims a specific contrary intent.

This holding is problematic for two reasons. First, the plain language of the rule does not predicate the admissibility of other acts evidence on the defendant first affirmatively making a claim of a contrary intent.⁴⁷

Second, this rule is inconsistent with the operation of Rule 404(b). Rule 404(b) excludes other acts evidence only if that evidence's sole function is to prove character and action in conformity therewith.⁴⁸ Therefore, the question is not whether the defendant makes a claim of contrary intent, but whether the evidence can prove something other than character.⁴⁹

The rule in *Wickizer* may be the result of an empirical determination by the court.⁵⁰ Where a defendant does not dispute intent or offer evidence (or argument) of a specific contrary intent, it is unlikely that other acts evidence offered to demonstrate intent will be very probative. The defense will, in effect, concede that whoever committed the crime intended it. Identity, not intent, will be the issue. Consequently, there is little need for this evidence; its probative value is low. It would therefore be excluded by Rule 403 in almost every case.

were explained by his violent racism. Rule 404(b), however, is supposed to erect a barrier to this inference. *See generally* Lannan v. State, 600 N.E.2d 1334 (Ind. 1992).

This is not to say that all evidence that may have the effect of demonstrating a racist character should be barred. Where other acts evidence shows character but has relevance with respect to something other than character, Rule 404(b) operates to admit the evidence subject, of course, to Rule 403. *See* Cliver v. State, 666 N.E.2d 59, 62-63 (Ind. 1996). *Kimble v. State*, 659 N.E.2d 182 (Ind. Ct. App. 1995), is an excellent example of a proper analysis of Rule 404(b) and this type of evidence.

46. The two main dangers of other acts evidence are: (1) that the jury may convict the defendant out of a bare desire to punish for the uncharged misconduct and (2) that the jury will conclude that the defendant is of bad character and for that reason committed the charged crime. *Wickizer*, 626 N.E.2d at 797.

47. *See* Cooper *supra* note 42, at 1052 n.15.

48. *See* Bacher v. State, 686 N.E.2d 791, 799 (Ind. 1997) (citing Hardin v. State, 611 N.E.2d 123, 128 (Ind. 1993)).

49. The approach in *Wickizer* also tends to focus on labeling the evidence as intent, motive et al. This is problematic because the listed proper purposes are convenient reference points, not rigid classifications. Evidence that is probative of intent will usually be probative of some other proper purpose. Therefore, it really does not make sense to label the evidence for purposes of adopting a specialized rule of admissibility.

50. A court's observation that summary judgment is rarely appropriate in negligence cases is an empirical observation. In close cases, this empirical observation may have an effect on the outcome.

Because the rules as written already dictate the result in *Wickizer*, there was no need to create an idiosyncratic rule.⁵¹ Therefore, that rule ought to be abandoned.

Although *Hicks v. State*⁵² was decided after the survey period, it will be discussed in this survey because of its importance. In *Hicks*, the defendant was charged with the murder of his girlfriend and the feticide of her unborn child. The trial court admitted evidence showing that the defendant had beaten the victim in the past and that the two had a violent relationship. The court concluded that evidence showing the defendant's hostility towards the victim was relevant but that some of the evidence failed the Rule 403 balancing test because of its low probative value and highly prejudicial effect.⁵³

51. This is not to say that the defendant "making something an issue" does not affect the admissibility of evidence. Where the defendant offers evidence (or argument) on a particular issue, there will be a greater need for other acts evidence relevant to that issue. This greater need would be properly considered by a trial judge in balancing the probative value versus the danger of unfair prejudice of the proffered evidence.

An example of where the court should have considered the fact that a party made something an issue on the determination of admissibility is *Swain v. State*, 647 N.E.2d 23 (Ind. Ct. App. 1995). In *Swain*, the defendant attempted to show that the police officer who arrested him was racially biased. As a result, the prosecution introduced evidence that the defendant had four previous convictions for dealing in cocaine to explain the officer's interest in the defendant. On appeal, the court held that the evidence was inadmissible because it was "irrelevant."

This holding is problematic for two reasons. First, the conclusion that the evidence was irrelevant is wrong. The *Swain* court evaluated the relevancy of the evidence under Rule 401, which is a logical relevance test. Certainly, the fact that the defendant had been convicted of dealing cocaine previously was logically relevant to the determination of whether he possessed cocaine on the occasion in question. *See Lannan v. State*, 600 N.E.2d 1334, 1337 (Ind. 1992); *see also United States v. Brewer*, 43 M.J. 43, 48 (U.S.A.F. Ct. App. 1995) (Crawford, J., concurring) (discussing difference between logical relevance of Rule 404(b) evidence and its legal relevance); *State v. Blackmon*, 941 S.W.2d 526, 529 (Mo. Ct. App. 1996) (same); *People v. Vandervliet*, 508 N.W.2d 114, 120 (Mich. 1993). Although the evidence was logically relevant under Rule 404(b), the evidence was not admissible to show a propensity for possessing cocaine.

Second, the court did not take into consideration the fact that the defendant made the police officer's motive in arresting the defendant an issue. Certainly, the prosecution was entitled to rebut the not so subtle suggestion that the defendant was singled out because of his race. Similarly, the court's Rule 403 analysis is flawed. The court is required to evaluate the possibility of *unfair* prejudice. In *Swain*, the defendant invited the prosecution to produce evidence concerning the police officer's motive. The prosecution did so. The fact that the evidence the prosecution chose to present did create the possibility of prejudice (i.e., that the jury would convict on an improper basis, namely the defendant's propensity to possess cocaine) should not alter its admissibility. Because the defendant made the police officer's motive an issue, he should not have been heard to complain of the possibility of prejudice in the prosecution's rebuttal. *But cf. State v. Lawton*, 667 A.2d 50, 55 (Vt. 1995) (prosecution may not engage in "overkill" where defendant "opens the door").

52. 690 N.E.2d 215 (Ind. 1997).

53. *Id.* at 223.

Hicks contains some excellent analysis. First, *Hicks* strongly reaffirms prior case law holding that other acts evidence tending to show hostility between the victim and the defendant is admissible under Rule 404(b).⁵⁴ Second, *Hicks* also properly notes that “[t]he list of other purposes is illustrative not exhaustive.”⁵⁵

Third, the court’s analysis in *Hicks* also correctly rejects the Seventh Circuit’s four-part test for the admissibility of other acts evidence.

Under this test, to be admissible: (1) the evidence must be directed toward establishing a matter in issue other than the defendant’s propensity to commit the charged act; (2) the prior bad act must be similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence must be sufficient to support a finding by the jury that the defendant committed the prior bad act; and (4) the proponent of the evidence must show that the probative value of the prior bad act is not substantially outweighed by the prejudicial effect on the defendant.⁵⁶

The *Hicks* court correctly concluded that dissimilarity and remoteness in time do not erect a *per se* bar to other acts evidence; instead, they are factors to be considered in the determination of the probative value of the evidence.⁵⁷ “In short, admissibility hinges on relevance, not a litmus test based on an isolated factor—remoteness, similarity, or anything else—that may bear on relevance.”⁵⁸

The decision is also significant because it follows *Huddleston v. United States*.⁵⁹ In all Rule 404(b) cases, it must be shown that the person against whom the evidence is offered actually committed the other act. If the person did not commit the act, the evidence is irrelevant. *Huddleston* dealt with the standard for the trial court’s preliminary determination that the person committed the other act. The Court concluded that the evidence “should be admitted if there is sufficient evidence to support a finding that the [person] committed the [other] act.”⁶⁰ This is to be contrasted with a court making a preliminary finding by a preponderance of evidence that the person committed the other act.⁶¹ If a reasonable jury could find that the person committed the other act, it should be permitted to so find.

One part of the opinion is troubling. The *Hicks* court discusses relevance in the context of Rule 404(b).⁶² This discussion has the possibility of causing some confusion. The court is not entirely clear about whether it means logical

54. *Id.* at 222 (citing *Ross v. State*, 676 N.E.2d 346 (Ind. 1996)).

55. *Id.* at 219 (citing *Hardin v. State*, 611 N.E.2d 123, 129 (Ind. 1993); *United States v. Russell*, 971 F.2d 1098, 1106 (4th Cir. 1992)).

56. *Id.* at 219.

57. *Id.* at 220.

58. *Id.*

59. 485 U.S. 681 (1988).

60. *Id.* at 685.

61. See IND. R. EVID. 104(a).

62. *Hicks*, 690 N.E.2d at 219.

relevance, which is defined by Rule 401, or legal relevance.⁶³ The distinction is vitally important to an understanding of Rule 404(b). Character evidence barred by Rule 404(b) is often logically relevant.⁶⁴ However, it is not legally relevant.

Consequently, it is difficult to determine exactly what the court means when it says, "The Rule [i.e. 404(b)] says that 'other crimes, wrongs, or acts' not offered to prove character 'may be admissible.' This throws the analysis back to Rule 402, which states that 'all relevant evidence is admissible.'"⁶⁵ If the analysis were "thrown back" to Rule 402, then other acts evidence would only have to satisfy a logical relevance⁶⁶ test (leaving aside the Rule 403 test) to be admissible under Rule 404(b).

The *Hicks* court may have been talking about the logical relevance requirement as enforced by Rule 104(b). Obviously, it must be shown that the defendant committed the other act. If that is not shown, the evidence does not meet a bare logical relevance test, and is therefore barred by Rule 402. But proving that the "defendant did it" does not guarantee admissibility under Rule 404(b). Rule 404(b) bars logically relevant evidence that only shows propensity.⁶⁷ Consequently, it must be stressed that logical relevance is a prerequisite to the admissibility of other acts evidence, not a guarantor of its admissibility.

In *Turner v. State*,⁶⁸ the defendant was convicted of the murder of a Ball State University student. On appeal, the defendant challenged the admissibility of "prior bad acts evidence."⁶⁹ The evidence demonstrated that the defendant had previously been forcibly ejected from a Ball State party the evening before the murder. In response, the defendant fired a gun through a door where the party was being held. The court found that the evidence was properly admitted

63. Legal relevance is undefined by the Rules of Evidence. The term, "relevant evidence," as used in the rules, means logical relevance. This is demonstrated by an evaluation of the rules. If "relevant evidence" meant legally relevant evidence, then the "except as otherwise provided" clause in Rule 402 would be superfluous.

64. See generally *Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992).

65. *Hicks*, 690 N.E.2d at 219.

66. The court may be thinking that Rule 402 refers to legal relevance when it uses the term "relevant evidence."

67. See *Lannan*, 600 N.E.2d at 1337 (discussing logical relevance of propensity evidence barred by Rule 404(b)).

68. 682 N.E.2d 491 (Ind. 1997).

69. "Prior bad acts" is a convenient shorthand for evidence admissible under Rule 404(b). It is the opinion of the author that the term should be discarded. First, Rule 404(b) does not require that the acts be "bad." *But see* *Robinson v. State*, 682 N.E.2d 806, 809 (Ind. Ct. App. 1997) (strictures of Rule 404(b) apply to "any conduct of the defendant which may bear *adversely* on the jury's judgment of his character") (quoting *Kimble v. State*, 659 N.E.2d 182, 185 n.5 (Ind. Ct. App. 1995) (emphasis added)). *See also* *Stevens v. State*, 689 N.E.2d 487 (Ind. Ct. App. 1987). Second, Rule 404(b) does not require that the acts in question happen before the charged crime. *See* *United States v. Bibo-Hernandez*, 922 F.2d 1398, 1399-1400 (9th Cir. 1991); *Moore v. State*, 653 N.E.2d 1010, 1016 (Ind. Ct. App. 1995).

because it demonstrated the defendant's motive. His enmity towards Ball State students as a result of his ejection from a party helped explain why the defendant decided to rob and kill a Ball State student.⁷⁰

The *Turner* court also evaluated whether the evidence tended to show a plan. In concluding that it did not, the court stated, "The prior offenses '[must] tend to establish a preconceived plan by which the charged crime was committed. The crimes must, therefore, be so related in character, time and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and charged crime.'"⁷¹

Turner is a perfect example of the type of evidence admissible under Rule 404(b). Often, other acts evidence is extremely probative. In this case, the evidence really helped to explain why the defendant would choose to murder the victim without much danger of the "forbidden inference." The evidence showed that the defendant was angry with Ball State students. A dislike of Ball State students is not a character trait. Therefore, the inference that the defendant had a motive for murdering the victim did not come from his character.⁷²

In *Hopkins v. State*,⁷³ the court evaluated the admissibility of testimony that the defendant had been involved in drug-dealing. The defendant contended that the testimony was admitted in violation of Rule 404(b).

In evaluating the defendant's contention, the court first announced the rule that other acts evidence must be examined to determine whether it is "offered to prove something other than the defendant's bad character or propensity to commit the charged crime."⁷⁴ In this case, the defendant attacked the credibility of the State's witness by questioning the witness about the witness' drug dealing and drug connections. On redirect examination, the State elicited the testimony about the defendant's drug dealing from that witness. The court held that this was permissible because the defendant opened the subject and because the prosecution had stipulated that the witness was a drug dealer.

This case merits some criticism. A defendant who impeaches a witness does not open the door for attacks on his own character.⁷⁵ The law allows defendants to vigorously cross-examine a State's witness. Often, this vigorous cross-examination will produce unflattering information about that witness. However, that does not give the State the license to admit evidence barred by Rule 404(b). Finally, the court's reference to the fact that the prosecution stipulated to the fact that the witness was a drug dealer is questionable. There is substantial authority for considering a defendant's stipulation to certain items in determining the

70. *Turner*, 682 N.E.2d at 496.

71. *Id.* at 496 n.5 (quoting *Malone v. State*, 441 N.E.2d 1339, 1347 (Ind. 1982)).

72. There are other examples. Evidence that a defendant did not carry auto insurance would be very probative of motive in a prosecution for leaving the scene of an accident. It would explain why the defendant left the scene.

73. 668 N.E.2d 686 (Ind. Ct. App. 1996).

74. *Id.* at 690 (citing *Bolin v. State*, 634 N.E.2d 546, 548 (Ind. Ct. App. 1994)).

75. *Cf. Johnson v. State*, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996) (defendant does not open door to attacks on his own character when he introduces evidence of victim's character).

admissibility of other acts evidence.⁷⁶ However, this proposition should not be extended to the State's ability to stipulate except in very limited circumstances. The defendant should not have the moral force of his evidence undermined by cold stipulations.⁷⁷

B. Rule 405

In *Brooks v. State*,⁷⁸ the defendant argued that the trial court erred when it refused to admit evidence that a homicide victim had been charged with two counts of battery. The *Brooks* court made short work of this argument. The court started with the general proposition that where self-defense is claimed, the victim's character for violence is "pertinent."⁷⁹ However, the rules of evidence only allow evidence of character in the form of opinion or reputation testimony, unless a person's character or character trait is an "essential element of a charge, claim, or defense"⁸⁰ In this case, the victim's character was not an essential element of the self-defense claim; accordingly, it was not provable by evidence of specific instances of conduct.⁸¹

It must be stressed that Rule 405 only deals with proof of character. If a victim's specific instances of conduct are relevant for some other purpose, then (subject to Rule 403) the evidence should be admissible. For example, the evidence may bear on the reasonableness of the defendant's fear of the victim if self-defense is an issue in the case.⁸² Of course, in those cases, it must be shown that the defendant knew of the specific instances of conduct.⁸³

C. Victim's Prior Sexual History

In *Williams v. State*,⁸⁴ the court dealt with a defendant's claim that the trial court improperly excluded testimony that an alleged sex crime victim had a practice of trading sex for cocaine.⁸⁵ The *Williams* court concluded that the trial

76. See *Old Chief v. United States*, 117 S. Ct. 644 (1997); *United States v. Crowder*, 87 F.3d 1405, 1409-14 (D.C. Cir. 1996) (en banc) (collecting cases); see also *United States v. Crawford*, 130 F.3d 1321, 1323 (8th Cir. 1997).

77. See *United States v. Jemal*, 26 F.3d 1267, 1273 (3d Cir. 1994) (citing *United States v. Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979)).

78. 683 N.E.2d 574 (Ind. 1997).

79. *Id.* at 576; see also IND. R. EVID. 404(a)(2).

80. See IND. R. EVID. 405(b).

81. See *Brooks*, 683 N.E.2d at 576-77 (citing *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995); *Johnson v. State*, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996); see also *Cooper*, *supra* note 42, at 1057 n.46 (discussing *Johnson* and *Keiser*).

82. See *State v. Nazario*, 694 A.2d 666, 668 (R.I. 1997) (victim's specific instances of conduct admissible as proof of defendant's reasonable fear).

83. See *id.*

84. 681 N.E.2d 195 (Ind. 1997).

85. Professor Cooper discusses the Indiana Court of Appeals' decision in this case (*Williams v. State*, 669 N.E.2d 182 (Ind. Ct. App. 1996)) in last year's survey. Cooper, *supra* note 42, at

court properly excluded the proffered evidence.⁸⁶

In reaching its conclusion, the *Williams* court first discussed the purposes of Rule 412⁸⁷ and the Rape Shield law.⁸⁸ The two provisions share the same purpose: they are designed to shield the victim from “surprise, harassment, and unnecessary invasions of privacy, and importantly, to remove obstacles to reporting sex crimes.”⁸⁹ The court then examined the defendant’s claim of error solely with respect to the Indiana Evidence Rules. Under Rule 412, defendants may introduce evidence of their past sexual conduct with the alleged victim, “but [Rule 412] does not permit a defendant to base his defense of consent on the victim’s past sexual experiences with third persons. The allegation of prostitution does not affect this calculus.”⁹⁰

The court also conditioned the admissibility of evidence of an alleged victim’s past sexual conduct to that evidence satisfying Rule 401 and Rule 403.⁹¹ In other words, even if evidence is admissible under Rule 412, it still must pass the logical relevance test of Rule 401 and the balancing test of Rule 403. In *Williams*, the court found that even if the evidence was admissible under Rule 412, it was properly excluded by the trial court.⁹² According to the *Williams* court, this evidence would have improperly focused the jury on the alleged previous acts of the victim rather than the defendant’s actions on the night in question.⁹³

The court then examined the defendant’s Sixth Amendment claims.⁹⁴ The

1057-60.

86. *Williams*, 681 N.E.2d at 200.

87.

In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or a witness may not be admitted, except:

(1) evidence of the victim’s or of a witness’s past sexual conduct with the defendant;

(2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;

(3) evidence that the victim’s pregnancy at the time of trial was not caused by the defendant; or

(4) evidence of a conviction of a crime to impeach under Rule 609.

IND. R. EVID. 412(a).

88. IND. CODE § 35-37-4-4 (1993). The court held that where this statute conflicts with Rule 412, Rule 412 controls. *Williams*, 681 N.E.2d at 200 n.6; *see also* McEwen v. State, No. 49500-9612-CR-731, slip op. at 17-20 (Ind. Apr. 30, 1998). *But see* Humbert v. Smith, 664 N.E.2d 356, 357 (deferring to legislature on foundational requirements of blood test evidence to establish paternity that conflict with Rule 803(6)).

89. *Williams*, 681 N.E.2d at 200.

90. *Id.* (citing United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991)).

91. *Id.* at 201.

92. *Id.*

93. *Id.*

94. The defendant did not raise a claim under article I, section 13 of the Indiana

court concluded that the defendant's Sixth Amendment rights were not violated in this case because "there was no restriction on the ability of the defense to present evidence of the incident."⁹⁵ The jury was able to evaluate both accounts of the incident in question.⁹⁶ Moreover, the proffered evidence did not serve to explain any of the physical evidence.⁹⁷ Therefore, under these facts, the defendant's constitutional rights were not violated.⁹⁸ The court went on to stress that a victim's past acts of prostitution are not admissible for that reason alone and that there is no constitutional right to present evidence of a victim's sexual activity with others solely on the basis of her past sexual acts.⁹⁹

V. WITNESSES (ARTICLE VI).

A. Competency

"Every person is competent as a witness except as otherwise provided by these rules or by act of the Indiana General Assembly."¹⁰⁰ In *Newsome v. State*,¹⁰¹ the court faced the question of whether this new rule abrogated pre-Rules case law dealing with the competency of child witnesses. In concluding that it did not, the court stated, "[W]e think the better reading of Ind. Evidence Rule 601 is to require the trial court to conduct an inquiry into witness competency to ensure that minimum standards of competence are met."¹⁰² Specifically, a court will have to determine whether the child "(1) understands the difference between telling a lie and telling the truth, (2) knows she is under compulsion to tell the truth, and (3) knows what a true statement is."¹⁰³

Judge Hoffman's concurrence introduces the idea that under Rule 601, a witness is presumed competent to testify.¹⁰⁴ Under that proposition, the party opposing the witness's testimony would be forced to rebut the presumption of

Constitution. Whether this provision affords defendants more protection than the Sixth Amendment in these cases is an open question.

95. *Williams*, 681 N.E.2d at 201.

96. *Id.*

97. Compare *id.* with *Richmond v. Embry*, 122 F.3d 866, 871 (10th Cir. 1997) (The defendant's Sixth Amendment rights were not violated where the defendant's counsel attempted to introduce evidence of victim's past sexual conduct through his own witness, not by cross-examination of victim or other prosecution witness; thus, the trial court did not deny defendant an entire relevant area of cross-examination.).

98. *Williams*, 681 N.E.2d at 201-02.

99. *Id.*

100. IND. R. EVID. 601.

101. 686 N.E.2d 868 (Ind. Ct. App. 1997).

102. *Id.* at 872.

103. *Id.*; see also IND. R. EVID. 603.

104. *Id.* at 877 (Hoffman, J., concurring) (citing *Thornton v. State*, 653 N.E.2d 493, 497 (Ind. Ct. App. 1995)).

competence.¹⁰⁵

It seems that there is little practical difference between the majority and the concurrence. In most situations, parties opposing the testimony will have to make their objections known to the court. The court will then have to determine whether the witness can offer testimony that has "minimum credibility."¹⁰⁶

B. Rule 609 Impeachment

Rule 609 deals with impeachment of a witness by a prior criminal conviction. Specifically, it allows a witness to be impeached by conviction of certain enumerated crimes or crimes involving dishonesty.¹⁰⁷ This survey will examine three cases¹⁰⁸ dealing with Rule 609 evidence. In *Jenkins v. State*,¹⁰⁹ the court evaluated the defendant's claim that the trial court should have undertaken a Rule 403 balancing analysis before admitting evidence of the defendant's prior conviction for robbery. The *Jenkins* court properly rejected this claim. It concluded that the Indiana version of Rule 609(a)¹¹⁰ embodied principles from *Ashton v. Anderson*,¹¹¹ which gave the trial court no discretion in admitting this evidence.¹¹² This holding is supported by the plain language of Rule 609(a), which uses the mandatory "shall."¹¹³

Rule 609(b) imposes a ten-year time limitation on the use of prior convictions measured either from the date of conviction or date of release from incarceration.¹¹⁴ However, under that rule, the court may admit evidence of a "stale" conviction if the court determines that "in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."¹¹⁵

105. *See id.*

106. 3 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 601[01], at 601-09 to -10 (1988); *see also* United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984).

107. IND. R. EVID. 609(a).

108. One Rule 609 case decided in the survey period, *Cason v. State*, 672 N.E.2d 74 (Ind. 1996), was discussed in last year's survey and therefore will not be discussed here. Cooper, *supra* note 42, at 1060. *Kent v. State*, 675 N.E.2d 332, 338 n.1 (Ind. 1996), also mentions Rule 609. The *Kent* court noted that commentary on a defendant's *misdemeanor* convictions was permissible under Rule 609 because the defendant had testified. Unless the misdemeanors involved dishonesty or false statements, this observation was incorrect. *See* IND. R. EVID. 609.

109. 677 N.E.2d 624 (Ind. Ct. App. 1997).

110. The court noted that the rule differs from its federal counterpart in that the federal counterpart expressly makes the admissibility of the evidence subject to a Rule 403 balancing analysis. *Id.* at 626-27.

111. 279 N.E.2d 210 (Ind. 1972).

112. *Jenkins*, 677 N.E.2d. at 627.

113. IND. R. EVID. 609(a); *see also* Harney & Markavitch, *supra* note 15, at 898 n.103.

114. IND. R. EVID. 609(b).

115. *Id.*

In *Dowdy v. State*,¹¹⁶ the court evaluated a defendant's claim that the trial court improperly admitted evidence of an "aged" conviction in violation of Rule 609(b). The defendant in *Dowdy* was charged with robbery. On cross-examination of the defendant, the prosecution introduced evidence that the defendant had been convicted of robbery more than ten years before the trial.

At the outset of its analysis, the court properly noted that there is a bias against the admissibility of aged convictions.¹¹⁷ The court went on to adopt the Seventh Circuit's five-part test to determine the admissibility of the aged convictions.¹¹⁸ This test provides the following non-exclusive list of factors by which to evaluate the admissibility of an aged conviction:

- (1) the impeachment value of the prior crime;
- (2) the point in time of the conviction and the witness' subsequent history
- (3) the similarity between the past crime and the charged crime;
- (4) the importance of the defendant's testimony; and
- (5) the centrality of the credibility issue.¹¹⁹

Seemingly, this test is tailored to instances where the government is impeaching a defendant who chooses to take the stand in his own defense. In determining that the prior robbery conviction was admissible to impeach the defendant, the *Dowdy* court found it significant that the defendant was charged with robbery.¹²⁰

This conclusion is open to some criticism. Because the evidentiary value of the prior conviction is solely for its impeachment value, it would seem that the similarity between the charged crime and the prior crime would militate against admissibility; one could reasonably ask why a defendant's veracity would be influenced by the similarity of the charged crime to the prior crime. The similarity between the two crimes invites the inference that, because the defendant did it before, the defendant is guilty of the charged crime.¹²¹ This is an impermissible inference, yet the *Dowdy* court seems to embrace just such an

116. 672 N.E.2d 948 (Ind. Ct. App. 1996).

117. *Id.* at 951.

118. *Id.*

119. *Id.* (citing *United States v. Castor*, 937 F.2d 293, 298-99 (7th Cir. 1991)).

120. *Id.* at 952 ("Here, because Dowdy was charged with two counts of robbery, the impeachment value of his 1982 robbery conviction was very significant.").

121. See *United States v. Hernandez*, 106 F.3d 737 (7th Cir. 1997) (where impeachment crime is similar to charged crime, likelihood of prejudice is higher); *United States v. Causey*, 9 F.3d 1341, 1344 (7th Cir. 1993) (similarity militates against admissibility but is not dispositive); *State v. Kissner*, 541 N.W.2d 317, 324 (Minn. Ct. App. 1995) ("In general, the greater the similarity between the prior offense and the present offense, the greater the reason for not allowing the use of the prior conviction for impeachment purposes."); *State v. Gentry*, 747 P.2d 1032, 1037 (Utah 1987) (similarity between charged crime and prior crime "highly likely to prejudice jurors and unduly influence their conclusion concerning defendant's guilt"); *State v. Gonzalez*, 922 P.2d 210, 213 (Wash. Ct. App. 1996) (greater similarity between prior and current offense means greater potential for prejudice).

inference. This part of *Dowdy* ought to be reexamined in the near future.

Rule 609 allows the impeachment of defendants and ordinary witnesses. In *Schwestak v. State*,¹²² the court evaluated a trial court's refusal to allow the defendant to impeach a prosecution witness with evidence of a more than ten year old conviction. The *Schwestak* court held that this decision is to be reviewed for an abuse of discretion.¹²³ In affirming the trial court, the *Schwestak* court stated, "We cannot see why the probative value of this conviction, which is more than ten years old, is so high as to overcome the general rule that stale convictions are inadmissible."¹²⁴ It seems that after *Schwestak*, it is unlikely that Indiana appellate courts will reverse a trial court's decision to exclude evidence of stale convictions absent an extraordinary showing.

VI. OPINION EVIDENCE

A. Lay Witness Opinions

In *Kent v. State*,¹²⁵ the Indiana Supreme Court discussed the admissibility of lay witness opinion testimony. In *Kent*, the defendant was home alone with his girlfriend's two children. When the girlfriend returned home, she found her son "lying on his bed, pale and white in color, perspiring around the hairline, and with a blue spot on his neck."¹²⁶ When questioned by his girlfriend about the boy's injuries, the defendant replied that the boy had fallen into the bathtub and that he had fallen off the toilet. At trial, the State elicited testimony from a police officer with emergency medical training that "the condition of the child is not conducive with a fall in a bath tub."¹²⁷

The *Kent* court held that the trial court did not abuse its discretion in allowing the testimony. Citing Rule 701, the court concluded that the testimony, "though not expert, [was] 'rationally based on [the officer's] perception' and [was] 'helpful to a clear understanding' of [the officer's] testimony."¹²⁸ This conclusion is certainly open to some criticism. The *Kent* court may have blurred the line between lay witness opinion testimony governed by Rule 701 and expert witness testimony governed by Rule 702.¹²⁹ Although there is ample authority

122. 674 N.E.2d 962 (Ind. 1997).

123. *Id.* at 964.

124. *Id.*

125. 675 N.E.2d 332 (Ind. 1996).

126. *Id.* at 335.

127. *Id.* at 338.

128. *Id.* at 339.

129. See *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1198 (5th Cir. 1995) (discussing spectrum of Rule 701 cases). *Asplundh Manufacturing* contains an excellent discussion of the rationale behind Rule 701. Rule 701 was intended to liberalize the traditional common law strictures on lay witnesses giving "opinion" testimony. See *id.* at 1195. The Rule was designed to deal with situations where

it is impossible or difficult to reproduce the data observed by the witnesses, or the facts

for treating the observations of skilled lay observers as falling under Rule 701, the police officer's testimony in this case seems to fall under the rubric of expert, rather than lay, testimony. The cause of injuries seems to be the province of medical experts, not lay observers. Although there are certain types of idiosyncratic injuries that lay observers may be able to adequately describe and characterize to a jury,¹³⁰ this case did not seem to be one of those. In this case, the police officer did not appear to have particularized knowledge of the type of injuries suffered in this case; consequently, allowing him to testify about what did or did not cause the injuries is problematic.

B. Rule 702

In *McGrew v. State*,¹³¹ the Indiana Supreme Court evaluated the admissibility of hair comparison analysis. In *McGrew*, after a hearing concerning the admissibility of the hair comparison analysis, an Indiana State Police hair comparison analyst testified at trial. The defendant argued on appeal that the prosecution had failed to sustain its burden of demonstrating the reliability of the hair comparison analysis. The Indiana Supreme Court rejected that claim and determined that the trial court "exercised appropriate discretion as to the reliability of the proffered hair comparison analysis."¹³²

The *McGrew* court analyzed the case as one involving Rule 702(b); however,

are difficult of explanation, or complex, or are of a combination of circumstances and appearances which cannot be adequately described and presented with the force and clearness as they appeared to the witness, the witness may state his impressions and opinions based on what he observed. It is a means of conveying to the jury what the witness has seen or heard. If the jury can be put into a position equal vantage with the witness for drawing the opinion, then the witness may not give an opinion. Because it is sometimes difficult to describe the mental or physical condition of a person, his character or reputation, the emotions manifest by his acts; speed of a moving object or other things that arise in a day to day observation of lay witnesses; things that are of common occurrence and observation, such as size, heights, odors, flavors, color, heat, and so on; witnesses may relate their opinions or conclusions of what they observed.

United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982) (as quoted in JOHN F. SUTTON, JR. & OLIN GUY WELLBORN III, CASES AND MATERIALS ON EVIDENCE (8th ed. 1992)); *see also Asplundh Manufacturing*, 57 F.3d at 1192 (Rule was designed to allow witnesses to give "shorthand renditions.").

It is an expansion of the "core" of Rule 701 to allow opinion evidence outside the realm of common knowledge or understanding. *See id.* at 1199 (discussing how Rule 701 has been expanded to deal with matters outside ordinary lay opinion). *Kent* certainly takes an expansive view of Rule 701; this expansive view may need reexamination.

130. Compare *Kent*, 675 N.E.2d at 339 with *United States v. Myers*, 972 F.2d 1566, 1576-78 (11th Cir. 1992) (stun gun injuries) and *Mariscal v. State*, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997) (opinion that knife wounds were self-inflicted).

131. 682 N.E.2d 1289 (Ind. 1997).

132. *Id.* at 1292.

at the end of the opinion, the court seemed to agree with the trial court judge who stated, “[W]hat we’re talking about is *not the traditional scientific evaluation*. We are talking about simply a person’s observations under a microscope.”¹³³ Consequently, the opinion is not entirely clear about why Rule 702(b) applies to hair comparison analysis, nor does it clearly delineate whether hair comparison analysis is scientific knowledge or technical or other specialized knowledge.

Rule 702 treats scientific evidence differently from technical or specialized knowledge. Rule 702(a) allows the admission of “scientific, technical, or other specialized knowledge”¹³⁴ through expert testimony if such evidence will assist the trier of fact. Rule 702(b) states that “[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.”¹³⁵ The plain language of Rule 702(b) suggests that only scientific knowledge is subject to the foundational requirements of Rule 702(b).¹³⁶ The *McGrew* decision simply does not reveal what standard governs the admissibility of technical or other specialized knowledge.

Another somewhat puzzling part of the *McGrew* opinion is the fact that the court seems to analyze the case under Rule 702(b), which requires the court to find that the scientific principles upon which hair comparison analysis is based are reliable. However, the court did not seem to undertake any analysis concerning the scientific principles upon which hair comparison analysis is based. In fact, the court quoted the colloquy between the analyst and the defendant’s attorney: “When asked by the defendant what ‘scientific principle is used to base the reliability of hair sample technique[,]’ the analyst testified, ‘Scientific principle? It’s just simply a physical comparison of one hair directly to another one.’”¹³⁷ From the opinion it appears that the analyst never stated any scientific principles to support the reliability of hair comparison analysis.¹³⁸

Perhaps the answer may be in the court’s statement: “Inherent in any

133. *Id.* (emphasis added).

134. IND. R. EVID. 702(a).

135. IND. R. EVID. 702(b).

136. The *McGrew* court stated, “This subsection [i.e., Rule 702(b)] differs from the Federal Rules of Evidence in its express requirement that expert testimony be based upon reliable scientific principles.” *McGrew*, 682 N.E.2d at 1290 (citing *Jervis v. State*, 679 N.E.2d 875, 881 n.9 (Ind. 1997); *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)). This cryptic statement can be read to condition the admissibility of *all* expert testimony on the satisfaction of Rule 702(b)’s foundational requirement. This would be contrary to the plain language of Rule 702 which makes a distinction between scientific knowledge and technical or other specialized knowledge. At first glance, such a requirement would not seem that onerous—until one considered that many experts are not scientists, e.g., carpenters, policemen, bricklayers, etc.

137. *Id.* at 1290.

138. The court noted that the analyst compared a number of different parts and characteristics of the hair. *Id.* However, this does not establish the scientific principles upon which hair comparison analysis evidence is based. Rather, it shows how the comparison was done; it does not show *why* the comparison is reliable.

reliability analysis is the understanding that, as the scientific principles become more advanced and complex, the foundation required to establish reliability will necessarily become more advanced and complex as well.”¹³⁹ However, in *McGrew*, there was no showing of *any* scientific principle guaranteeing the reliability of hair comparison analysis.

McGrew also leaves an important question unanswered, i.e., the boundary between scientific knowledge—the admissibility of which is governed by Rule 702(b)—and technical or other specialized knowledge, the admissibility of which is not expressly governed by Rule 702 or any other evidence rule. Despite the uncertainty in the *McGrew* opinion, one thing is clear: hair comparison analysis will be admissible in Indiana.¹⁴⁰ The new battleground over this evidence will be the qualification of the analyst making the comparison.

VII. HEARSAY

A. *Out of Court Statements as Non-Hearsay*

In *Angleton v. State*,¹⁴¹ the court stated, “If a statement, the substantive content of which does not *directly* assert the declarant’s state of mind, is admitted to show only the declarant’s state of mind, it is not hearsay.”¹⁴² This proposition raises the issue of the implied assertion and its effect on the hearsay character of an out of court statement. In *Angleton*, the court dealt with a variety of out of court statements made by a murder victim before she died. One example is the victim’s statement that she wanted a dog, wanted a gun, and wanted to make sure she got up in the morning. The court held that these statements were not admitted to show what the victim wanted (i.e., the truth of the matter asserted) but rather that she was “fearful and unhappy.”¹⁴³ As such, the evidence served as circumstantial proof of the declarant’s state of mind.

This decision raises some interesting issues, especially since the Indiana Supreme Court appeared to reach a contrary view several months earlier in *Ross v. State*.¹⁴⁴ In general, it seems that the weight of federal authority holds that implied assertions are not hearsay.¹⁴⁵ However, a large number of decisions rest

139. *Id.* at 1292.

140. For a lengthy discussion of *McGrew*, see William F. Harvey, *Inadvertent Disclosure, Work-product Privilege, Other Holdings*, RES GESTAE, Jan. 1998, at 36.

141. 686 N.E.2d 803 (Ind. 1997).

142. *Id.* at 808 (citing *Dunaway v. State*, 440 N.E.2d 682, 686 (Ind. 1982)); *Byrd v. State*, 579 N.E.2d 457, 463 (Ind. Ct. App. 1991), *aff’d in part, vacated in part on other grounds*, 593 N.E.2d 1183 (Ind. 1992) (emphasis added)).

143. *Id.* at 809.

144. 676 N.E.2d 339, 345 (Ind. 1997) (rejecting as hearsay out of court statement that implied a fact).

145. See *State v. Collins*, 886 P.2d 243, 245 (Wash. Ct. App. 1995) (collecting cases); *see also Carlton v. State*, 681 A.2d 1181, 1184 (Md. Ct. App.) (describing differing approaches by federal courts), *cert. denied*, 686 A.2d 634 (Md. 1996).

on the fact that the statement at issue was not intended to be an assertion.¹⁴⁶ Out of court statements that are not assertions are, by definition, not hearsay.¹⁴⁷

In *Angleton*, it seems that the declarant intended to assert something but just not exactly what the statement was offered to prove. The statement was then not offered to prove the truth of the matter asserted and consequently was properly admitted—at least as far as a mechanical application of the rule is concerned. However, problems could arise, depending on the closeness of the facts asserted in the out of court statement and the fact the out of court statement is offered to prove.¹⁴⁸

B. Statements Defined as Non-Hearsay by Rule 801(d)

Rule 801(d) excludes certain out-of-court statements from the definition of hearsay. Because these statements are defined as nonhearsay, they may be considered by the fact-finder as substantive evidence on the merits. Two cases examining this rule merit discussion. In *Cooley v. State*,¹⁴⁹ the issue was the admissibility of a witness' out-of-court statement. In that out-of-court statement, the witness had told police that the defendant "was dealing drugs." The court made short work of the State's argument that the out-of-court statement constituted the statement of a party-opponent.¹⁵⁰ "The reason [the witness'] statement here is hearsay is because she is testifying about *her* prior unsworn statements[;] . . . [w]hat makes this testimony hearsay is that she was testifying as to what she said on a prior occasion, not as to what [the] defendant said."¹⁵¹

In *Humphrey v. State*,¹⁵² a witness gave an unsworn statement to the police that the defendant had gone out to a truck with "white guys"¹⁵³ in it, that the witness heard a noise, and that the defendant returned stating that he had shot one

146. See *United States v. Long*, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990); *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990); *United States v. Groce*, 682 F.2d 1359, 1364-65 (11th Cir. 1982); *United States v. Zenni*, 494 F. Supp. 464 (E.D. Ky. 1980) (*Zenni* has had a tremendous influence in this area of the law.); *Jim v. Budd*, 760 P.2d 782, 784-85 (N.M. Ct. App. 1987); *Collins*, 886 P.2d at 245; *Guerra v. State*, 897 P.2d 447, 461 (Wyo. 1995).

147. See IND. R. EVID. 803(a)(1), (c).

148. See *United States v. McGlory*, 968 F.2d 309, 332 (3d Cir. 1992) ("We encounter the problem when: the matter which the declarant intends to assert is different from the matter to be proved, but the matter asserted, if true, is circumstantial evidence of the matter to be proved.") (citing *United States v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983)); see also *United States v. Palma-Ruedas*, 121 F.3d 841, 857 (3d Cir. 1997); *Brown v. Commonwealth*, 487 S.E.2d 248, 251 (Va. Ct. App. 1997) (en banc).

149. 682 N.E.2d 1277 (Ind. 1997).

150. See IND. R. EVID. 801(d)(2). The State argued that the witness' out-of-court statement was gleaned from the defendant's statements to her and therefore constituted the defendant's statement.

151. *Cooley*, 682 N.E.2d at 1282.

152. 680 N.E.2d 836 (Ind. 1997).

153. The shooting victim in this case was white.

of them. On the stand, the witness testified that he did not know the defendant and that he was not with the defendant on the night of the murder. The State then offered the evidence of the prior statement.¹⁵⁴

The court began its analysis by concluding that the statement was “‘classic hearsay’ not ordinarily admissible as substantive evidence.”¹⁵⁵ The fact that the witness was available to testify on the stand did not deprive the statement of its hearsay character if offered to prove the truth of the matter asserted in the statement.¹⁵⁶ Although the statement was inadmissible as substantive evidence, it was admissible to impeach the witness as a prior inconsistent statement.¹⁵⁷

Because the statement was admissible for one purpose (impeachment) and inadmissible for another purpose (as substantive evidence), the defendant could have requested a limiting instruction. However, he did not. In a well-reasoned discussion of the policy reasons for placing the onus of requesting a limiting admonition on the parties, the court held that the defendant’s failure to do so constituted waiver of the issue.¹⁵⁸

The *Humphrey* court also discussed an instruction given to the jury to the effect that the jury was free to consider any witness’ prior inconsistent statement as substantive evidence bearing on the defendant’s guilt.¹⁵⁹ Because the defendant did not object to this instruction at trial or on appeal, the court found that the defendant had waived the issue.¹⁶⁰ The court did however state that the instruction, which mirrored an Indiana Pattern Jury Instruction,¹⁶¹ should “not be used in trials in this state.”¹⁶²

Lastly, the court discussed the defendant’s claim that there was insufficient evidence to support the jury’s finding of guilt. In evaluating the defendant’s sufficiency claim, the court considered the witness’ prior inconsistent statement as substantive evidence supporting the verdict because a limiting admonition was

154. This was so even though the witness was called by the State. Rule 607 allows the impeachment of a witness by any party, including the party calling the witness. *See United States v. Ienco*, 92 F.3d 564, 568 (7th Cir. 1996) (discussing Rule 607’s abolition of the common law voucher rule). For an interesting discussion of this rule and the possibility of the prosecution using it as a subterfuge to get prior inconsistent statements of a hostile witness in front of the jury, see *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984).

155. *Humphrey*, 680 N.E.2d at 838.

156. *Id.*

157. *Id.* at 838-39; *see also* IND. R. EVID. 613(b).

158. *Humphrey*, 680 N.E.2d at 839-40.

159. *Cooley* and *Humphrey* also contain an excellent discussion of the *Patterson* rule (where the instruction in *Humphrey* originated) and its demise. *Patterson v. State*, 324 N.E.2d 482 (Ind. 1975), *overruled by* *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991); *see also* Kenneth M. Stroud, *Justice DeBruler and the Dissenting Opinion*, 30 IND. L. REV. 15, 18 (1997). Previously, in Indiana, “prior statements made by witnesses who were available to testify under oath were [excluded from the hearsay rule].” *Cooley*, 682 N.E.2d at 1281.

160. *Humphrey*, 680 N.E.2d at 840.

161. 2 IND. PATTERN JURY INSTRUCTIONS (CRIM.) No. 12.19 (2d ed. 1991).

162. *Humphrey*, 680 N.E.2d at 840.

not sought.¹⁶³ This seems a harsh result, but it is correct. Hearsay in and of itself is not necessarily unreliable,¹⁶⁴ and where it is admitted without objection or without a proper limiting admonition it may not only support the verdict but also may be the only evidence sustaining the verdict.¹⁶⁵

Cooley and *Humphrey* clear up some confusion that may have resulted from a previous decision in this area. In a previous case, the court cited Rule 801(d) for the proposition that statements offered for the purpose of impeachment were not hearsay.¹⁶⁶ Commentators have aptly criticized *Hilton*;¹⁶⁷ it is therefore unnecessary to repeat those criticisms here. Suffice it to say that *Cooley* and *Humphrey* are accurate statements of the law and to the extent that *Hilton* is inconsistent with them, it should not be followed.

C. Hearsay Exceptions

1. *Excited Utterances*.—A number of decisions during the survey period evaluated the excited utterance exception to the hearsay rule.¹⁶⁸ In the first of these cases, *Yamobi v. State*,¹⁶⁹ the court evaluated the admission of a murder victim's statement to a police officer as the victim was dying.¹⁷⁰ The defendant claimed that the statement did not fall within the excited utterance exception for two reasons: 1) the statement was elicited by the police officer's questions and 2) too much time had elapsed between the statement and the startling event.

The court determined that Rule 803(2) codified the common law excited utterance exception.¹⁷¹ The court then stated that the statement had to meet a three part test in order to be admissible: "1) a startling event occurs; 2) a statement is made by a declarant while under stress of the excitement caused by

163. *Id.* at 840-41 (citing *Banks v. State*, 567 N.E.2d 1126, 1129 (Ind. 1991); *Keller v. State*, 560 N.E.2d 533, 534-35 (Ind. 1990)).

164. *Id.* at 840.

165. See *United States v. Hugh-Chalmers Toyota-Chevrolet, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986); *United States v. Taylor*, 900 F. Supp. 618, 621 n.2 (E.D.N.Y. 1995); *State v. Kulmec*, 644 A.2d 887, 901-02 (Conn. 1994). But see *State v. Corvers*, 646 So. 2d 1125 (La. Ct. App. 1994).

166. *Hilton v. State*, 648 N.E.2d 361, 362 (Ind. 1995). Of course, statements offered for impeachment are not hearsay because they are not offered to prove the truth of the matter asserted. See *Birdsong v. State*, 685 N.E.2d 42, 46 (Ind. 1997). The problem (other than the fact that Rule 801(d) does not speak to this issue) with citing Rule 801(d) for that proposition is that statements offered under Rule 801(d) are admissible as substantive evidence. Run-of-the-mill prior inconsistent statements are not admissible as substantive evidence.

167. Harney & Markavitch, *supra* note 15, at 906 n.157; William F. Harvey, *Evidence: Impeachment by Prior Inconsistent Statements and Hearsay*, RES GESTAE, Jan. 1996, at 15 (characterizing *Hilton* as a bit confused).

168. IND. R. EVID. 803(2).

169. 672 N.E.2d 1344 (Ind. 1996).

170. The statement was not admitted as a dying declaration. See IND. R. EVID. 804.

171. *Yamobi*, 672 N.E.2d at 1346.

the event; and 3) the statement relates to the event.”¹⁷² The court also emphasized that a mechanical inquiry is unjustified.¹⁷³ The touchstone of admissibility is “whether the statement is inherently reliable because the declarant is incapable of thoughtful reflection.”¹⁷⁴

Under the facts presented, the court concluded that the trial court correctly admitted the statement. The fact that the statement was in response to questioning was only a factor in determining the admissibility of the statement.¹⁷⁵ The court noted that the declarant had just been shot and had not talked to anyone else and that the statement was in response to the police officers first and only question.¹⁷⁶

As for the time elapsing between the event and the statement, the court held that it was a factor to be considered in evaluating the admissibility of the evidence. The key to the admissibility was not the amount of time that had elapsed,¹⁷⁷ but whether the declarant was still under the stress of the startling event.¹⁷⁸ “A statement made while in a condition of excitement theoretically stills the capacity for reflection and prevents fabrication.”¹⁷⁹

In *Carter v. State*,¹⁸⁰ the court determined that a shooting victim’s statements made to a police officer in an emergency room immediately after the shooting were admissible. The court found that the case was “almost identical” to *Yamobi*.¹⁸¹ The court also concluded that the fact that the declarant could not

172. *Id.*

173. *Id.*

174. *Id.*; see also *United States v. Sowa*, 34 F.3d 447, 452 (7th Cir. 1994) (justification for excited utterance exception is that statements are made under circumstances that “eliminate the possibility of fabrication, coaching, or confabulation”) (quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)).

175. *Yamobi*, 672 N.E.2d at 1346; see also *Brown v. State*, 683 N.E.2d 600, 603 (Ind. Ct. App. 1997) (statement does not lose spontaneity simply because it was elicited by police questioning). However, the type and manner of the police questioning has some impact on the inherent reliability of the extra-judicial statements. See *Yamobi*, 672 N.E.2d at 1346; see also *State v. Barnies*, 680 A.2d 449, 452-53 (Me. 1996) (collecting cases); *State v. Smith*, 909 P.2d 236, 241 (Utah 1995) (significant that questions were “open-ended”).

176. *Yamobi*, 672 N.E.2d at 1346.

177. However, if the court cannot determine the time between the startling event and the statement, the evidence should be excluded. See *Browne v. State*, 933 P.2d 187, 191 (Nev. 1997).

178. *Yamobi*, 672 N.E.2d at 1346; see also *United States v. Sherlock*, 962 F.2d 1349, 1352 (9th Cir. 1989) (rape victims had spoken to others and had time to concoct story before allegedly excited utterance made).

179. *City of Dallas v. Donovan*, 768 S.W.2d 905, 906-08 (Tex. App. 1989, no writ). *Donovan* also contains an excellent analysis of the degree of relatedness of the extrajudicial statement to the startling event. See also *Woodworth v. Estate of Yunkin*, 673 N.E.2d 825, 828 (Ind. Ct. App. 1996) (statement unrelated to startling event not admissible).

180. 686 N.E.2d 834 (Ind. 1997).

181. *Id.* at 837.

remember making the statements did not make the statements inadmissible.¹⁸² This holding is consistent with federal case law¹⁸³ and is entirely correct. The fact that the declarant made the statements is not solely provable by the declarant remembering having made them. The police officer heard them and could testify under oath that they were made. Then the only issue becomes the inherent reliability of the statement. Because it was made under the stress of a startling event, the statement was inherently reliable and therefore admissible.¹⁸⁴

In *Carter v. State*,¹⁸⁵ the court examined the admissibility of an excited utterance where the issue was the personal knowledge of the declarant. In order for an excited utterance to be admissible, the declarant must have personally observed (or perceived) the startling event.¹⁸⁶ However, that requirement may be satisfied by circumstantial evidence.¹⁸⁷ In *Carter*, the court held that the statement, "Daddy said pow," satisfied the requirement.¹⁸⁸ This leads to the conclusion that the hearsay statement itself may provide the necessary circumstantial evidence to demonstrate the personal knowledge of the declarant. *Carter* also provides a reminder that the admissibility of the declarant's out-of-court statement is not predicated on the declarant being competent to testify.¹⁸⁹

2. *Then Existing State of Mind*.—In *Bacher v. State*,¹⁹⁰ the Indiana Supreme Court evaluated the defendant's contention that the trial court impermissibly allowed testimony that the murder victim was fearful of the defendant. The *Bacher* court treated the testimony as hearsay even though the testimony contained no reference to the fact that the source of the information was the victim's statements to the testifying witness.¹⁹¹ The court held that even if the

182. *Id.* (citing *State Street Duffy's, Inc. v. Loyd*, 623 N.E.2d 1099, 1103 (Ind. Ct. App. 1993)).

183. *See, e.g.*, *United States v. Scarpa*, 913 F.2d 993, 1016-17 (2d Cir. 1990); *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980) ("lack of recall may indicate declarant was under stress at time of statement").

184. *Carter*, 686 N.E.2d at 837. A rule that required declarants to always remember their excited utterances would be difficult to justify in light of the fact that people often cannot remember what they said in stressful situations.

185. 683 N.E.2d 631 (Ind. Ct. App. 1997).

186. *Id.* at 632. *But see State v. Lenarchick*, 247 N.W.2d 80, 93 (Wis. 1976) ("personal observation of startling event not required if declarant under influence of startling event"). Another issue that may occur in this area is the identity of the declarant. *See Miller v. Keating*, 754 F.2d 507, 510 (3d Cir. 1985) (statement by unidentified declarants not *per se* inadmissible).

187. *Carter*, 683 N.E.2d at 632.

188. The declarant was also in the house where the shooting occurred. The court found that this did not prove that the declarant was in the room where the victim was shot. *Id.*

189. *Id.*; *see also Morgan v. Foretich*, 846 F.2d 941, 946-47 (4th Cir. 1988); *State v. Bauer*, 704 P.2d 264, 267 (Ariz. Ct. App. 1985).

190. 686 N.E.2d 791 (Ind. 1997).

191. *See id.* at 797. Justice Sullivan brought up an interesting question: "This raises the nice evidentiary question of whether a witness's testimony offered to prove the truth of the matter asserted that is based solely on information provided by another is stripped of its hearsay character

testimony was hearsay, it was admissible as a statement of the victim's then existing state of mind.¹⁹²

This conclusion drew a sharp dissent from Justice Boehm (with Justice Dickson concurring). As the dissent points out, the court's analysis is somewhat troubling. A victim's state of mind is usually not relevant to prove the defendant's conduct; rather, the admissibility of that evidence "must be tied to some subsidiary issue in the case."¹⁹³ In this case, there was no dispute about the inharmoniousness of the relationship between the victim and the defendant.¹⁹⁴ Therefore, according to the dissent, the evidence was not relevant and therefore inadmissible.¹⁹⁵

In this author's opinion, the dissenting view is sounder. The dissent correctly points out that the majority's reliance on *Lock v. State*¹⁹⁶ is problematic. In *Lock*, the defendant had made her relationship with the murder victim an issue.¹⁹⁷ In *Bacher*, there was no such evidentiary dispute.¹⁹⁸ Furthermore, in this case, the majority did not focus on why the facts of this case made the victim's then

by removing all reference to the source of the information." *Id.* On this point, see 2 MCCORMICK ON EVIDENCE § 249, at 104 (John William Strong, ed. in chief, 4th ed. 1992) ("[T]he hearsay objection cannot be obviated by eliciting the purport of the statement in indirect form.). *But cf.* Strickland Transp. Co. v. Ingram, 403 S.W.2d 192, 195 (Tex. App. 1966, no writ) ("The hearsay character of the testimony must affirmatively appear before it may be disregarded on appeal."). Justice Sullivan's observation also raises the issue of the distinction between the hearsay rule and the requirement of personal knowledge. *See* 2 MCCORMICK ON EVIDENCE, *supra*, § 247, at 99.

192. *See* IND. R. EVID. 803(3).

193. *Bacher*, 686 N.E.2d at 803 (Boehm, J., dissenting).

194. *Compare id. with* Angleton v. State, 686 N.E.2d 803, 809 (Ind. 1997) ("A victim's state of mind is relevant where it has been placed in issue by the defendant."). In *Angleton*, the defendant had "portrayed [the victim] as [his] happily married wife who peacefully spent her time writing love notes and poems [to the defendant]." *Id.* In *Angleton*, the court took pains to emphasize the fact that the evidence of the victim's state of mind was particularly probative. This is to be contrasted with the court in *Bacher*.

195. *Cf.* Headlee v. State, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997). "If the fact sought to be proved under the suggested non-hearsay purpose is not relevant, or it is relevant, but its danger of unfair prejudice substantially outweighs its probative value, the hearsay objection should be sustained." *Id.* (citing Craig v. State, 630 N.E.2d 207, 211 (Ind. 1994)).

196. 567 N.E.2d 1155, 1159-60 (Ind. 1991).

197. Often, a defendant will offer evidence that his or her relationship with the victim was good. The suggestion to the jury, of course, is that the defendant did not kill the victim because the two of them were on good terms. It is readily apparent that the prosecution should be allowed to rebut this evidence by demonstrating the victim's state of mind, either through the hearsay exception provided by Rule 803(3) or through any other permissible means. *Angleton* is a good example of this situation.

198. *Bacher*, 686 N.E.2d at 802 (Boehm, J., dissenting). There are, of course, other situations where the victim's state of mind is admissible. *See* State v. Baca, 902 P.2d 65, 71 (N.M. 1995) (giving common examples, such as where the defendant claims self-defense or that the victim committed suicide); *see also* State v. Nance, 533 N.W.2d 557, 559 (Iowa 1995) (giving examples).

existing state of mind probative. The dissent did so and concluded that the victim's fearfulness of the defendant simply was not relevant.

Other jurisdictions have examined evidence admitted under the then existing state of mind exception showing that the victim feared the defendant (as was the case in *Bacher*) and have concluded that it should not be used to prove the conduct of the defendant or identify the defendant as the perpetrator.¹⁹⁹ One such case is *Commonwealth v. Qualls*.²⁰⁰ In *Qualls*, the court cogently explained the dangers of allowing evidence of the victim's fear of the defendant:

In this context, it seems clear that the Commonwealth's case against the defendant may have been significantly enhanced by the introduction of statements made by one of the victims in the hours, days, and weeks prior to the murders expressing fear that the defendant was going to kill him. [The victim's] statements that he was afraid that the defendant would kill him could have been seen by the jury as "a prophecy of what might happen to him." His statements of fear were certainly "a voice from the grave casting an incriminating shadow on the defendant."²⁰¹

The victim's fearfulness of a defendant, as opposed to other states of mind, presents special dangers. The *Bacher* court does not recognize this reality.

The *Bacher* dissent does not reveal whether the hearsay evidence passes the bare logical relevance test of Rule 401. That is certainly an open question, but the real issue, as illustrated by the case law, is the likelihood of unfair prejudice when hearsay evidence of the victim's fear of the defendant is introduced. In the author's view, the rule should be that evidence of the victim's fear of the defendant should be inadmissible, unless particularized circumstances of the case make that evidence particularly probative.

3. *Business Records Exception*.—*Stahl v. State*,²⁰² involved a challenge to the admissibility of an affidavit asserted to fall under the business record exception to the hearsay rule.²⁰³ In *Stahl*, the defendant was charged with defrauding a bank and theft. According to the State, the defendant withdrew cash from an ATM without authorization. To prove the lack of authorization, the State introduced an affidavit of forgery that the bank had required the account holder to sign so that the account could be recrated.

199. One exception to this rule would be where the victim's fear was an essential element of the crime (e.g., extortion). *See, e.g.*, *United States v. Collins*, 78 F.3d 1021, 1036 (6th Cir. 1996); *United States v. Adcock*, 558 F.2d 397, 404 (8th Cir. 1977).

200. 680 N.E.2d 61 (Mass. 1997).

201. *Id.* at 67 (quoting *United States v. Day*, 591 F.2d 861, 883 (D.C. Cir. 1978)); *United States v. Brown*, 490 F.2d 758, 781 (D.C. Cir. 1974); *see also State v. Charo*, 754 P.2d 288, 291-92 (Ariz. 1988); *State v. Canady*, 911 P.2d 104, 111 (Haw. Ct. App. 1996); *Baca*, 902 P.2d at 71-72 ("The principal danger is that the jury will consider the victim's fear as somehow reflecting on the defendant's state of mind rather than the victim's—i.e., as a true indication of the defendant's intentions, actions or culpability.").

202. 686 N.E.2d 89 (Ind. 1997).

203. IND. R. EVID. 803(6).

The court correctly held that the affidavit was not admissible under the business records exception.²⁰⁴ In doing so, the court embarked on a detailed analysis of pre-Rules Indiana case law, federal case law and the plain language of Rule 803(6) itself. The opinion contains an excellent discussion of why information gained from outsiders is not inherently reliable and therefore does not fall under the business records exception.²⁰⁵ Such was the case here. The court also could have simply looked directly to the express trustworthy requirement in the rule itself to reach the same result.²⁰⁶ Obviously, the source of this information was not trustworthy. The statement served the source's monetary interests, and he was under no business duty to report the facts.²⁰⁷

4. *Public Records*.—In *Ealy v. State*,²⁰⁸ the court considered the admissibility of an autopsy report under Rule 803(8) in a criminal case. Rule 803(8) allows the admission of public documents and records as an exception to the hearsay rule. However, the rule itself excludes from its scope certain types of public documents and records.²⁰⁹ At the outset, the court determined that the autopsy report fell under Rule 803(8)(c), which excludes "factual findings offered by the government in criminal cases from this hearsay exception."²¹⁰

Rather than embracing a literal reading of the rule, the *Ealy* court embraced a more flexible rule. Courts evaluating the admissibility of government reports and documents in criminal cases must first determine if the findings address a "materially contested issue" in the case.²¹¹ If not, then the express requirement of trustworthiness in the rule is enough to protect the criminal defendant.²¹²

If the findings address a materially contested issue, then the court must evaluate the "nature of what is objected to."²¹³ If what is objected to is not clearly a factual finding, then the evidence is not inadmissible.²¹⁴ "Such evidence may be simple listings, or a simple recordation of numbers."²¹⁵ If the evidence

204. *Stahl*, 686 N.E.2d at 92.

205. *Id.* at 92; *cf. Pierce v. Atchison Topeka & Santa Fe Ry.*, 110 F.3d 431, 444 (7th Cir. 1997) (business record prepared to memorialize unusual incident and possibly prepared with an eye toward litigation properly excluded by trial court).

206. Most courts evaluate the source of the information in the business record, i.e., the person with actual knowledge. Where that person is outside the organization, "Rule 803(6) does not, by itself, permit the admission of the business record." *United States v. Baker*, 693 F.2d 183 (D.C. Cir. 1982). *But cf. United States v. Sokolow*, 91 F.3d 396, 403 (3d Cir. 1996) (information may be supplied by sources outside the organization if organization verifies accuracy of information).

207. *Stahl* also contains an analysis of the admissibility of the affidavit as a statement affecting an interest in property. IND. R. EVID. 803(15); *see* Part VII.C.5 *infra*.

208. 685 N.E.2d 1047 (Ind. 1997).

209. IND. R. EVID. 803(8)(a)-(d).

210. *Ealy*, 685 N.E.2d at 1050-51 & n.3.

211. *Id.* at 1054.

212. *Id.*

213. *Id.*

214. *See id.*

215. *Id.*

contains “factual findings,” then the court must determine whether it was “prepared for advocacy purposes or in anticipation of litigation. If it was not, then the evidence is admissible.”²¹⁶

Curiously, the *Ealy* court bases a part of its new test on whether the proffered evidence contains factual findings (as opposed to simple listings or recordations). However, earlier in the opinion the court states, “However, as the vagueness of the definition suggests, any determination as to whether something is a factual finding would be difficult to make, highly subjective, and difficult to review.”²¹⁷

Another problem with this opinion is its failure to mention section 34-1-17-7 of the Indiana Code.²¹⁸ Section 34-1-17-7, in conjunction with Rule 802, expressly makes autopsy reports admissible. This is so because “[h]earsay is not admissible except as provided by law *or* these rules.”²¹⁹ Because section 34-1-17-7 is undoubtedly a law, the plain language of Rule 802 operates to make the evidence admissible.

5. *Documents Affecting an Interest in Property*.—In *Stahl v. State*,²²⁰ the court considered the admissibility of the affidavit of forgery described above²²¹ under Rule 803(15)—documents affecting an interest in property. The court first reviewed the “sparse” case law on the subject and determined that the exception would apply to documents that were both “ancient” and “dispositive.”²²²

The court then examined the policy reasons behind this hearsay exception. First, these documents are usually carefully drawn and are usually not created with an eye toward the controversy in which they are admitted.²²³ Second, they usually have an added assurance that at least one of the parties involved in the creation of the document is motivated to ensure accuracy.²²⁴ Lastly, these documents often have a great deal of minutiae and often are expected to last for a long period of time.²²⁵ Consequently, it is impossible to expect that witnesses will be able to testify about the facts recited in the document. Therefore, out of necessity, the statements in the documents are admissible.²²⁶

The court then explained that the exception has been applied to non-dispositive documents (i.e., documents that do not create, in and of themselves,

216. *Id.*

217. *Id.* at 1051-52. The *Ealy* court’s requirement that the trial court *clearly* find that a given piece of evidence is not a factual finding may address its concerns about the difficulty of determining what constitutes a factual finding. However, a requirement that the trial court be sure of its decision does little to facilitate appellate review, particularly if there is an abuse of discretion standard of review.

218. IND. CODE § 34-1-17-7 (1993).

219. IND. R. EVID 802 (emphasis added).

220. 686 N.E.2d 89 (Ind. 1997).

221. See Part VII.C.3, *supra*.

222. *Stahl*, 686 N.E.2d at 93.

223. See *id.*

224. See *id.*

225. See *id.*

226. See *id.*

an interest in property).²²⁷ Presumably, this results from the fact that “the parameters of the phrase ‘establish or affect an interest in property’ are not entirely clear.”²²⁸ The *Stahl* court did not explicitly define these parameters, apparently leaving that for future cases.²²⁹ However, the court did require that, to be admitted, the document must be executed in circumstances that “generate confidence in its reliability.”²³⁰ Additionally, the court stated that recent and non-dispositive documents (like the affidavit of forgery) must be scrutinized more closely to ensure reliability.²³¹ Because the affidavit in this case was generated in conjunction with the present litigation and there was a motive for untruthfulness in its creation, it did not have a sufficient guarantee of reliability. Hence, it was inadmissible.

VIII. BEST EVIDENCE RULE²³²

Only one case dealt with the best evidence rule during the survey period. In *Thomas v. Department of State Revenue*,²³³ the court allowed the admission of a reconstructed tax return where there was no dispute about the accuracy of the evidence and no evidence that the original return was intentionally destroyed.²³⁴ This is a straightforward and correct application of the rule. The case also provides a reminder that an effective objection to secondary evidence will show the court an actual dispute about the accuracy of that evidence.

227. See *id.* (citing *United States v. Weinstock*, 863 F. Supp. 1529, 1535 (D. Utah 1994)).

228. *Id.* (quoting IND. R. EVID. 803(15)).

229. The *Stahl* court stated that “[i]t is debatable whether the affidavit should be described as one affecting an interest in property.” *Id.* at 93-94. The court is correct in its skepticism. The affidavit did not effect a change in title to the funds, nor did it in a strict sense grant an interest in those funds.

230. *Id.* at 94.

231. *Id.*

232. The Indiana Supreme Court has referred to the best evidence rule as an “original documents rule.” See *Moore v. State*, 498 N.E.2d 1, 3 (Ind. 1986).

233. 675 N.E.2d 362 (Ind. T.C. 1997). *Thomas* was decided before the author joined the Indiana Tax Court.

234. See IND. R. EVID. 1004.

HEALTH CARE LAW: A SURVEY OF 1997 DEVELOPMENTS

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INTRODUCTION

The 1997 Survey period had several notable developments in the expanding area of health care law. While both subtle and profound changes continue in this area of law, this Survey concentrates on those areas most likely to be of interest and use to practitioners. The Survey neither intends to be comprehensive in its scope nor all inclusive, but seeks to present a summary of significant changes in areas of provider liability, employment, contracts, reimbursement, legislation, and taxation.

I. HEALTH CARE PROVIDER LIABILITY: JUDICIAL DECISIONS

The Indiana judiciary decided several significant cases during the Survey period relating to liability of Indiana health care providers. The nature of the cases varied widely; several involved various aspects of the common law of medical malpractice while others involved interpretations of the Indiana Medical Malpractice Act.⁴

A. Statutory Construction of the Indiana Medical Malpractice Act

Under Indiana law, medical malpractice claims against a qualified health care provider are governed by the Indiana Medical Malpractice Act.⁵ If a health care provider chooses to qualify under the Malpractice Act, the provider or the provider's insurance carrier is required to file proof of financial responsibility with the Indiana Department of Insurance and pay a surcharge to the patients' compensation fund.⁶ Upon qualification, a health care provider's liability is

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4. IND. CODE §§ 27-12-1-1 to -18-2 (1993 & Supp. 1997). The term "Act" or "Malpractice Act" as used throughout this section of the Survey refers to the Indiana Medical Malpractice Act.

5. *Id.* § 27-12-3-1 (1993).

6. *Id.* § 27-12-3-2.

limited to \$100,000 per occurrence of medical malpractice.⁷ In the event a patient's damages exceed \$100,000, the patient may seek additional compensation from the patients' compensation fund to a maximum statutory limit of \$750,000.⁸ With few exceptions, a claim for medical negligence against a qualified health care provider may not be brought as an initial matter in court.⁹ Instead, the Malpractice Act requires the claim must first be filed with the Indiana Department of Insurance for presentation to a medical review panel for an opinion.¹⁰

Other significant benefits accrue to a health care provider upon qualification under the Act. For example, the statute of limitations contained in the Act requires that a competent, adult patient bring a malpractice action against a health care provider within two years from the occurrence of the specific act of medical malpractice,¹¹ rather than from the date that the cause of action accrues as required in the general tort statute of limitations.¹²

1. *State Constitutional Challenges to the Malpractice Act.*—During the Survey period, the Indiana courts explored the constitutionality of the distinction between the statute of limitations embodied in the Malpractice Act and the statute of limitations applicable to general tort cases. Specifically, the issue presented to the Indiana Court of Appeals in *Martin v. Richey*¹³ was whether the occurrence-based statute of limitations contained in the Malpractice Act¹⁴ violates the equal privileges and immunities clause¹⁵ or the open courts provision¹⁶ of the Indiana State Constitution.

In *Martin*, Ms. Martin visited the office of Dr. Richey, her obstetrician/gynecologist, in March 1991, complaining of a lump in her right breast. Dr. Richey was out of town at the time of Ms. Martin's office visit, but

7. *Id.* § 27-12-14-3(b).

8. *Id.* § 27-12-14-3(a), (c).

9. *Id.* § 27-12-8-4.

10. *Id.*

11. *Id.* § 27-12-7-1(b).

12. IND. CODE § 34-1-2-2 (1993).

13. 674 N.E.2d 1015 (Ind. Ct. App. 1997).

14. Section 27-12-7-1(b) provides the following:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.

IND. CODE § 27-12-7-1(b) (1993).

15. IND. CONST. art. I, § 23 (The equal privileges and immunities clause provides the following: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.").

16. *Id.* art. I, § 12. (The open courts clause provides, in pertinent part: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.").

his nurse made arrangements for Ms. Martin to have a mammogram. The results of the mammogram indicated that Ms. Martin had a benign cyst and a solid mass in the right breast. The nurse reported the results to Ms. Martin the following day and recommended that she schedule an excisional biopsy. Ms. Martin scheduled the biopsy to be performed by a surgeon five days following the office visit.¹⁷

Upon his return to the office, the nurse informed Dr. Richey of the results of Ms. Martin's mammogram and of the scheduled excisional biopsy. Dr. Richey contacted Ms. Martin, advised her to cancel her appointment for the excisional biopsy, and instead recommended that a needle aspiration be performed in his office. Dr. Richey performed the needle aspiration; the resulting pathology report indicated that there were no malignant cells present in the specimen. Dr. Richey's office record for Ms. Martin did not reflect any recommendations regarding follow-up care or subsequent examinations.¹⁸

Approximately three years later, Ms. Martin experienced increased pain from the lump in her breast and pain under her right arm. A mammogram revealed an abnormal mass in the right breast. A core biopsy produced a diagnosis of adenocarcinoma of the breast. Ms. Martin subsequently underwent a modified radical mastectomy of the right breast and a five-month course of chemotherapy.¹⁹

Ms. Martin filed a proposed complaint against Dr. Richey pursuant to the Malpractice Act alleging that Dr. Richey was negligent in his medical care and treatment due to his failure to diagnose and treat her breast cancer in a timely manner.²⁰ Dr. Richey filed a motion to dismiss, arguing that Ms. Martin's complaint was time barred under the occurrence-based statute of limitations contained in the Act.²¹ Dr. Richey supported his motion by demonstrating that the alleged negligence occurred on March 20, 1991, and that the physician-patient relationship between him and Ms. Martin ended no later than October 2, 1991. Since Ms. Martin's proposed complaint was not filed with the Indiana Department of Insurance until October 14, 1994, the trial court held that the complaint was time barred.²²

On appeal, the Indiana Court of Appeals reversed the trial court concluding that the statute of limitations contained in the Malpractice Act violated both the privileges and immunities clause and the open courts provision of the Indiana Constitution.²³ With respect to the privileges and immunities clause, the court explained that "[u]nder the legislative scheme now in force, plaintiffs of medical negligence whose statute of limitations has expired prior to the time they become aware of or *discover* the malpractice, are treated unequally" from the victims of

17. *Martin*, 674 N.E.2d at 1017.

18. *Id.*

19. *Id.* at 1017-18.

20. *Id.* at 1018.

21. *Id.*

22. *Id.*

23. *Id.* at 1029.

other torts.²⁴

In finding that the Malpractice Act's statute of limitations violated the "open courts" provision of the Indiana Constitution, the court of appeals examined the language of the provision and the purpose and structure of the Indiana Constitution as demonstrated by the case law interpreting the specific provision.²⁵ The court concluded that the intent of the framers of the Constitution in 1851 could "not have been other than to recognize two independent rights: the right of access to the courts and the right to a complete tort remedy."²⁶ Therefore, the court found that the limitation provision in the Medical Malpractice Act was an unconstitutional abrogation of the right to a complete tort remedy as guaranteed by the open courts provision.²⁷

The controversy regarding the constitutionality of the occurrence-based statute of limitations in the Malpractice Act was not laid to rest during the Survey period with the *Martin* decision. In direct opposition to *Martin*, a separate panel of the Indiana Court of Appeals in *Johnson v. Gupta*²⁸ held that the two-year occurrence-based statute of limitations did not violate the open courts provision or the equal privileges and immunities clause of the Indiana Constitution.²⁹ In *Johnson*, Dr. Gupta performed a surgical procedure on Ms. Johnson in September 1990. Following the surgical procedure, Ms. Johnson experienced medical problems that Dr. Gupta assured her would eventually subside. It was not until 1994 when another physician discovered that Dr. Gupta's surgery had been improperly performed resulting in a complete and total loss of control over Ms. Johnson's bowel function.³⁰

Upon discovery of the alleged medical malpractice, Ms. Johnson filed a proposed complaint pursuant to the Malpractice Act.³¹ Dr. Gupta moved for summary judgment asserting that the claim was initiated after the expiration of the two-year occurrence-based statute of limitations.³² The trial court granted summary judgment in favor of Dr. Gupta on the basis of the statute of limitations,³³ and Ms. Johnson appealed contending that the statute of limitations was unconstitutional.³⁴ The court of appeals acknowledged the appellate decision in *Martin v. Richey*, but rejected its analysis of both the open courts provision and the equal privileges and immunities clause of the Indiana

24. *Id.* at 1023 (emphasis original).

25. *Id.* at 1024.

26. *Id.* at 1025.

27. *Id.* at 1026. The reasoning and the holding of *Martin* was adopted in another medical malpractice case by a separate panel of the Indiana Court of Appeals in *Harris v. Raymond*, 680 N.E.2d 551 (Ind. Ct. App. 1997).

28. 682 N.E.2d 827 (Ind. Ct. App. 1997).

29. *Id.* at 830-31.

30. *Id.*

31. *Id.* at 829.

32. *Id.*

33. *Id.* at 828.

34. *Id.*

Constitution.³⁵

In addressing the open courts provision, the *Johnson* court cited a number of cases which have interpreted the open courts provision in relation to various statutes of limitations, including the statute contained in the Malpractice Act, and noted that in each instance the statute was held constitutional.³⁶ The court reasoned that the open courts provision does not require that every plaintiff have a remedy for injuries suffered.³⁷ Although the Indiana Constitution prohibits the legislature from taking away vested property rights created by the common law,³⁸ the court reasoned that there were no vested rights or property rights at issue in the case.³⁹ As noted by the court, “[t]he right to bring a common law action is not a fundamental right.”⁴⁰ Instead, the legislature has the power to modify or restrict common law rights and remedies in cases involving personal injury.⁴¹ According to the court, the occurrence-based statute of limitations found in the Malpractice Act was simply one restriction which the Indiana legislature placed on medical malpractice claims to ensure the availability of malpractice insurance for Indiana physicians and, in turn, medical services for Indiana residents.⁴² In holding that the occurrence-based statute of limitations was constitutional under the open courts provision,⁴³ the court concluded that “[s]imply because the legislature has abolished or restricted a remedy does not render a statute unconstitutional.”⁴⁴

In reviewing the plaintiff’s equal privileges and immunities argument, the court acknowledged that medical malpractice claimants and health care providers are treated differently from other personal injury claimants.⁴⁵ The disparate treatment is based upon the claimant’s status as a patient and that the injuries arose from a breach of the duty owed by a health care provider.⁴⁶ Applying a two-prong test,⁴⁷ the *Johnson* court reached a conclusion different from that of

35. *Id.* at 829, 831.

36. *Id.* at 829 (citing *Bunker v. National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982) (statute of limitations for asbestos exposures); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (1981) (products liability statute of limitations); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980) (medical malpractice statute of limitations); *Dillon v. Chicago S. Shore & N. Bend R.R. Co.*, 654 N.E.2d 1137 (Ind. Ct. App. 1995) (Indiana Tort Claims Act limitations on liability)).

37. *Id.*

38. *Id.* at 830 (quoting *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 594 (Ind. 1980)).

39. *Id.*

40. *Id.* (quoting *Dague*, 418 N.E.2d at 213).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 831.

46. *Id.*

47. The two-prong test, derived from *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994), considers (1) whether the disparate treatment accorded by the legislation is reasonably related to

the court in *Martin*. The *Johnson* court found that a reasonable relationship existed between legislation limiting the time allowed to bring medical malpractice claims and the inherent characteristics which distinguish the class receiving the unequal treatment.⁴⁸ The court reasoned that the disparate treatment is based upon the claimant's status as a patient and the fact that the injuries arose from a breach of the duty owed by the health care provider.⁴⁹ In addition, the court acknowledged that health care providers are distinguished by the type of services they render and that the disparate treatment is "a response to the reduction in health care services available to Indiana residents and the financial uncertainties in the health care industry."⁵⁰

The court found that the Malpractice Act's occurrence-based statute of limitation also survived the second prong of the *Collins* analysis. The court stated that persons discovering their medical malpractice action within the two-year statute of limitations are not treated differently from those who discover the malpractice after the expiration of two years, since all malpractice claimants have two years from the date of the occurrence to file a claim.⁵¹ Although the court recognized that the occurrence-based statute of limitations may cause harsh and unequal results in certain cases, the court concluded that the statute was "reasonable in light of other policy considerations."⁵²

The Indiana Supreme Court was scheduled to hear oral arguments on May 4, 1998. Thus, the bench and bar must await the final disposition of this important issue.

2. *Limit on Recoverable Damages and Access to Patients' Compensation Fund.*—Two cases decided during the Survey period considered the Malpractice Act's limit on recoverable damages and access to the patients' compensation fund.

In *Miller v. Memorial Hospital of South Bend, Inc.*,⁵³ the parents of an infant brought a medical malpractice action against the delivering physician and the hospital for injuries allegedly sustained prior to and subsequent to the child's birth. The plaintiffs eventually settled their claim against the physician and received the statutory maximum recovery authorized by the Malpractice Act. The case was then dismissed as to the physician.⁵⁴

inherent characteristics which distinguish the unequally treated classes and (2) whether the preferential treatment is uniformly applicable and equally available to all persons similarly situated.

48. *Johnson*, 682 N.E.2d at 831 (citing *Rohrbaugh v. Wagonor*, 413 N.E.2d 891, 893 (Ind. 1980)).

49. *Id.* (citing *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 597 (Ind. 1980)).

50. *Id.*

51. *Id.*

52. *Id.* (citing *Havens v. Ritchey*, 582 N.E.2d 792, 795 (Ind. 1991)). Judge Friedlander's dissenting opinion was based on his view that the occurrence-based statute of limitations in the Malpractice Act was unconstitutional under the open courts provision of the Indiana Constitution. *Id.*

53. 679 N.E.2d 1329 (Ind. 1997).

54. *Id.* at 1332.

Thereafter, the hospital moved for summary judgment arguing that the Malpractice Act prohibited additional recovery since the injuries allegedly sustained by the infant as a result of the conduct of the physician and the hospital were identical.⁵⁵ The plaintiffs responded by asserting that the claim against the hospital was for *post natal* injuries that were separate and distinct from the claim for *prenatal* injuries against the delivering physician.⁵⁶ The hospital replied by pointing out that the plaintiffs had never raised any distinction between the alleged injuries in their proposed complaint, their submission of evidence to the medical review panel, or in their complaint filed in court.⁵⁷

The trial court granted the hospital's motion for summary judgment and the court of appeals affirmed.⁵⁸ On transfer, however, the Indiana Supreme Court reversed, finding that there existed a genuine issue of material fact whether the infant suffered separate injuries from two distinct acts of medical malpractice.⁵⁹

The supreme court first observed that "there is no dispute that, if there are two separate and distinct injuries caused by two separate occurrences of malpractice, the [Malpractice Act] does not preclude two separate recoveries (each separately limited in accordance with the Act)."⁶⁰ Finding a genuine issue of material fact, the supreme court relied primarily upon a physician's affidavit submitted by the plaintiffs in response to the hospital's motion for summary judgment. The affidavit stated that the injuries sustained by the infant as a result of the conduct of the physician were distinct from those injuries sustained as a result of the conduct of the hospital staff.⁶¹

The supreme court rejected the hospital's argument for summary judgment based on the plaintiffs' proposed and final complaints alleging only one cause of action and one injury for which the statutory maximum compensation had been received through the settlement with the physician.⁶² Under Indiana's notice pleading rules, a complaint need not state all elements of a cause of action; a

55. *Id.* at 1331. The Malpractice Act's limitation on recoverable damages applies to "any injury or death of a patient" that results from "an occurrence of malpractice." IND. CODE § 27-12-14-3(a), (b) (1993). The Act authorizes only one recovery in those cases where a single injury exists, irrespective of the number of acts of malpractice causing the injury. *See Bova v. Roig*, 604 N.E.2d 1 (Ind. Ct. App. 1992).

56. *Miller*, 679 N.E.2d at 1331.

57. *Id.*

58. *Id.* at 1330 (citing *Miller v. Memorial Hosp.*, 645 N.E.2d 631, 634 (Ind. Ct. App. 1994)).

59. *Id.*

60. *Id.* at 1331.

61. *Id.* The expert witness' affidavit stated in pertinent part that:

The post natal injury caused by the hospital's breach of the appropriate standard of care is a different and separate injury from the prenatal injury caused by the obstetrician with different parts of the brain being affected by the prenatal hypotisic insult and the post natal metabolic insult . . . making the injuries distinct in character.

Id.

62. *Id.* at 1332.

plaintiff must only plead the operative facts involved in the dispute.⁶³ The court observed that the plaintiffs had described separate counts against the defendants in their complaints and alleged different dates for each of the defendants' alleged acts of malpractice. The court further declined to interpret the plaintiffs' general injury allegations as limiting the complaints to a claim for a single injury resulting from the conduct of both defendants.⁶⁴

The court also rejected the hospital's claim for summary judgment on the basis that the plaintiffs had not distinguished between the alleged prenatal and post natal injuries in their submission to the medical review panel.⁶⁵ The court reasoned that, although the Malpractice Act required that the plaintiffs' claim be presented to a duly formed medical review panel, there was nothing in the Act that required the plaintiffs to fully and explicitly define each and every aspect of their claim in the submission to the medical review panel.⁶⁶

In finding that a genuine issue of material fact existed regarding the injuries suffered and the acts of malpractice involved, the court noted the "rare factual circumstances of this case"⁶⁷ and cautioned that they did not intend its decision to "lead to any significant increase in the bifurcation of medical malpractice claims."⁶⁸

The second case to address the issue of damages under the Malpractice Act was *Smith v. Pancer*.⁶⁹ In *Smith*, Dr. Ronald Pancer and Dr. Richard Thompson were psychiatrists doing business as Pancer Psychiatric Services.⁷⁰ Terry Smith received psychiatric treatment from Dr. Pancer and Dr. Thompson during a four-month period of time.⁷¹ The patient subsequently filed a proposed complaint for medical malpractice with the Indiana Department of Insurance naming as defendants Dr. Pancer, Dr. Thompson, and Pancer Psychiatric Services.⁷² Dr. Pancer and Dr. Thompson were both qualified health care providers as defined in the Malpractice Act.⁷³ Pancer Psychiatric Services, however, was not a qualified health care provider.⁷⁴

The patient's claim was submitted to a medical review panel in accordance with the procedural requirements of the Malpractice Act.⁷⁵ The review panel issued a unanimous opinion that the defendant health care providers were negligent in rendering care to the patient and that the defendants' negligence was

63. *Id.* (citing *State v. Rankin*, 294 N.E.2d 604 (Ind. 1973)).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 679 N.E.2d 893 (Ind. 1997).

70. *Id.* at 894.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 895.

75. *Id.* at 894.

a factor in the resultant damages.⁷⁶ The patient then brought suit in the trial court against the health care providers.⁷⁷

Shortly before the case was scheduled for trial, the parties entered into a settlement agreement.⁷⁸ The patient agreed as part of the settlement to substitute Summit Psychiatric Services, P.C., as the sole defendant in the case and to dismiss the three originally named defendants.⁷⁹ Summit Psychiatric Services was a professional corporation incorporated during the time that the patient was undergoing psychiatric treatment with Dr. Pancer and Dr. Thompson.⁸⁰ Dr. Pancer and Dr. Thompson initially were equal owners of Summit Psychiatric Services. At the time of settlement, however, the professional corporation was wholly owned by Dr. Pancer.⁸¹ Summit Psychiatric Services was not a qualified health care provider under the Malpractice Act.⁸² In consideration for the settlement, the patient received a payment which was the functional equivalent of the \$100,000 primary maximum recovery available under the Malpractice Act.⁸³

The patient filed a petition seeking additional compensation from the patients' compensation fund in accordance with the provisions of the Malpractice Act.⁸⁴ The insurance commissioner filed a motion for summary judgment arguing that, since Summit Psychiatric Services was not a qualified health care provider under the Malpractice Act, the patient was precluded from recovering payment from the patients' compensation fund.⁸⁵ The trial court granted the motion and entered summary judgment for the commissioner; the court of appeals affirmed.⁸⁶ The Indiana Supreme Court granted transfer and reversed.⁸⁷ The supreme court noted the requirement of the Malpractice Act that, in order to gain access to the patients' compensation fund for excess recovery, a plaintiff must demonstrate that a qualified health care provider or its insurer had "agreed to settle its liability on a claim by payment of its policy limits."⁸⁸ In denying the plaintiff access to the patient's compensation fund, the court of appeals had relied primarily upon the express language of the settlement document made between the plaintiff and Summit Psychiatric Services, which was not a qualified

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 895.

83. *Id.* See IND. CODE § 27-12-14-4(b) (1993) (provides for structured settlements that are deemed to satisfy the liability limitation under the Malpractice Act).

84. *Smith*, 679 N.E.2d at 895.

85. *Id.*

86. *Id.*

87. *Id.* at 898.

88. *Id.* (quoting IND. CODE § 27-12-15-3 (1993)).

health care provider under the Malpractice Act.⁸⁹ According to the court of appeals, because Summit was not a qualified health care provider, the plaintiff had failed to demonstrate that a qualified health care provider or its insurer had agreed to settle its liability.⁹⁰ The Indiana Supreme Court, reviewing the provisions of the Malpractice Act, found nothing to preclude the parties from agreeing to an oral malpractice claim settlement or to one only partially written.⁹¹ According to the supreme court, though the settlement agreement was between a non-qualified health care provider and a patient, the settlement had the effect of releasing the plaintiff's claim against all four health care providers involved in the lawsuit, two of which were qualified health care providers.⁹² On that reasoning, the court concluded that a genuine issue of material fact existed as to whether either Dr. Pancer or Dr. Thompson, as qualified health care providers, were among those who had agreed to settle the plaintiff's claim. The court, therefore, reversed the judgment in favor of the commissioner on that issue.⁹³

The supreme court also found a question of fact as to whether the payment made to the plaintiff was attributable to one or more qualified health care providers in a sufficient amount to allow access to the patients' compensation fund.⁹⁴ According to the supreme court, the genuine issue of fact precluding summary judgment arose because the record failed to demonstrate the extent to which the liability alleged in the plaintiff's complaint was attributed to the qualified and unqualified health care providers in the lawsuit.⁹⁵ According to the court, the genuine issue of fact that precluded summary judgment was driven, in part, by the factual issue of whether the two physicians involved in the case were jointly or severally liable on the plaintiff's claim. Accordingly, the supreme court reversed the grant of summary judgment in favor of the commissioner on this issue as well.⁹⁶ The supreme court remanded the case to the trial court for further proceedings consistent with its opinion.⁹⁷

B. New "Wrongful Birth" Cause of Action Recognized

In 1997, the Indiana Court of Appeals recognized a cause of action in Indiana

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Under the structured settlement provisions of the Medical Malpractice Act, when more than one qualified health care provider participates in the structured settlement, a single qualified health care provider must be liable for at least \$50,000 in order to satisfy the primary recovery limits and allow a patient access to the patient's compensation fund. *See IND. CODE § 27-12-14-4(b)* (1993).

95. *Smith*, 679 N.E.2d at 897.

96. *Id.*

97. *Id.*

for wrongful birth.⁹⁸ In 1979, Connie Johnson gave birth to a daughter born with multiple birth defects. The infant required extensive medical care until she died four months later. Mrs. Johnson became pregnant again in 1982, and, because of the birth defects of her first child, sought genetic counseling with Dr. Bader to confirm whether the pregnancy was affected by any birth defects.

Mrs. Johnson sought Dr. Bader's counseling in 1991 when she became pregnant with her third child. An amniocentesis performed at 19½ weeks gestation revealed no abnormalities, yet an ultrasound test performed on the same day indicated that the baby's head had an unusual shape and was larger than expected. Dr. Bader requested that Mrs. Johnson be scheduled for follow-up tests; due to an office error the tests were not scheduled. A second ultrasound was performed at 33 weeks gestation which indicated that the baby suffered from multiple defects. The pregnancy was too advanced to terminate; Mrs. Johnson gave birth to a baby girl on September 4, 1991. The infant suffered from hydrocephalus and multiple congenital defects and died from her condition less than four months later.⁹⁹

Mrs. Johnson and her husband brought suit against Dr. Bader alleging that had they been aware of the defects at the time of the first ultrasound, they would have terminated the pregnancy. The suit alleged a claim for wrongful birth and sought damages for the Johnsons' lost opportunity to terminate the pregnancy, physical pain of delivery, emotional pain and anguish of knowing that their child would suffer multiple congenital defects with little chance of survival, care and treatment provided for their child, medical expenses incurred, lost personal time and lost income, and for emotional anguish of watching their child suffer and die.¹⁰⁰

Dr. Bader moved for summary judgment, asserting that Indiana does not recognize a claim for wrongful birth.¹⁰¹ The trial court denied his motion and concluded that the Johnsons could recover damages if they could prove each element of the tort of negligence.¹⁰² The court of appeals affirmed the trial court's denial of Dr. Bader's summary judgment motion.¹⁰³ In doing so, the court differentiated the claims of wrongful birth and wrongful life.¹⁰⁴ Indiana has rejected claims for wrongful life¹⁰⁵ but had not previously addressed the viability

98. Bader v. Johnson, 675 N.E.2d 1119 (Ind. Ct. App. 1997).

99. *Id.* at 1121-22.

100. *Id.* at 1122.

101. *Id.*

102. *Id.*

103. *Id.* at 1127.

104. *Id.* at 1122. The court stated that "[w]rongful birth" refers to claims brought by parents of a child born with birth defects alleging that due to negligent medical advice or testing they were precluded from an informed decision about whether to conceive a potentially handicapped child or, in the event of a pregnancy, to terminate it." *Id.* at 1122 (citing *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 633 (Ind. 1991)). The court defined "wrongful life" as the seeking of damages on behalf of the child rather than the parents. *Id.* at 1124.

105. *Cowe*, 575 N.E.2d at 633.

of a claim for wrongful birth.

The court of appeals followed the majority of states who have found that parents may recover for the wrongful birth of a child.¹⁰⁶ The court rejected Dr. Bader's argument that the court should defer to the legislature for creation of a cause of action for wrongful birth, stating that a claim for wrongful birth can be resolved through a traditional tort analysis.¹⁰⁷ The court also rejected Dr. Bader's argument that recognizing a wrongful birth action would give a parent the discretion to decide which defects would lead to the termination of the pregnancy; they held that this argument essentially goes to the measure of damages.¹⁰⁸ The court reasoned that parents have an unconditional right to abortion during the first trimester of a pregnancy; they held that being deprived of that right is an injury regardless of the reason for wanting to exercise the right.¹⁰⁹

In addition, the court was not persuaded that allowing damages for wrongful birth would increase the usage of pre-natal screening and would encourage physicians to advise abortions.¹¹⁰ The court further rejected Dr. Bader's argument that the element of proximate causation was not met.¹¹¹ The court reasoned that the defendant's negligence, the harm that proximately caused the effect on the parents, was the denial to the parents of their right to decide whether to bear a child with a genetic or other defect.¹¹²

With regard to the issue of damages, Dr. Bader argued the only damages that should be recoverable are the medical and other costs directly related to Mrs. Johnson carrying the child to term.¹¹³ The court noted that other courts addressing damages for wrongful birth agree that the mother should recover expenses for the continued pregnancy and birth, the mother's pain and suffering associated with the continued pregnancy and birth, and loss of consortium.¹¹⁴

Courts have diverged on the issue of recoverable damages when addressing extraordinary medical and related expenses for the child and emotional distress damages for the parent. The court in *Bader* agreed with the majority of other courts and held that the Johnsons could recover the extraordinary medical and related expenses due to the defects.¹¹⁵

106. *Bader*, 675 N.E.2d at 1122-23 (The court noted that of the 31 states and the District of Columbia which have spoken to this issue, 22 states and the District of Columbia have recognized wrongful birth claims by judicial decision.).

107. *Id.* at 1124.

108. *Id.*

109. *Id.*

110. *Id.* In summary statements, the court indicated that they failed to see a reason for discouraging prenatal screening and that simply recognizing a claim for wrongful birth does not require physicians to counsel abortion. *Id.*

111. *Id.*

112. *Id.* (citations omitted).

113. *Id.* at 1125.

114. *Id.*

115. *Id.* While the court agreed that extraordinary medical and related expenses were

The question of recovery for emotional distress caused the greatest problem for this court. Indiana courts apply the modified impact rule to determine whether damages for emotional distress may be recovered. The impact rule states that when:

[A] plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person [S]uch a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.¹¹⁶

The majority in the *Bader* court found that the impact rule does not preclude recovery for emotional distress in a wrongful birth case because the court believed that the parents of the child were directly involved in the impact resulting from Dr. Bader's negligence and that the resulting trauma was of a kind and extent normally to be expected to occur in a reasonable person.¹¹⁷

Damages for emotional distress, however, were not allowed.¹¹⁸ Two judges in separate opinions used differing reasoning and disallowed recovery for emotional distress. One judge found that Indiana's modified impact rule applies to wrongful birth claims and thus disallowed emotional distress damages because the parents' injuries did not result from a direct impact.¹¹⁹ The second judge found that, while the impact rule does not preclude recovery, damages for emotional and mental anguish are too speculative and conjectural because it is impossible to separate the distress caused by the lost opportunity to abort the fetus from all the other distress attributable to carrying and bearing a child with defects.¹²⁰

Thus, the court held that damages were recoverable for extraordinary medical and other expenses relating to the child's defects, pain and suffering, the medical and other expenses related to the continued pregnancy and birth, and loss of consortium.¹²¹ The court did not, however, allow recovery for emotional distress for the reasons set out above.¹²²

recoverable, it left the factual question of whether any benefit from the birth of the child has been derived that would offset the associated expenses to the jury to evaluate on a case-by-case basis. *Id.*

116. *Id.* at 1126 (citing *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

117. *Id.*

118. *Id.*

119. *Id.* at 1127 (Friedlander, J., concurring).

120. *Id.* at 1128 (Garrad, J., dissenting in part and concurring in part).

121. *Id.* at 1127.

122. *Id.*

C. Attorney/Client Relationships and Scope of Discovery

In a dispute concerning production of discovery, the Federal District Court for the Southern District of Indiana clarified the relationship between an attorney representing a hospital and the hospital's board of trustees. In *Draus v. Healthtrust, Inc.*,¹²³ the attorney for the defendant inadvertently produced a letter she had written to the board of trustees of the hospital concerning the board's peer review of the plaintiff, Draus. The defendant sought return of the letter claiming that it was protected by the attorney-client privilege.¹²⁴ In opposing the motion to compel return of the letter, Draus argued that there was no attorney-client relationship between the attorney and the hospital's board of trustees, because the attorney represented only Healthtrust or the hospital, not the board of trustees; thus, the document was properly produced.¹²⁵

Finding that the letter was protected by the attorney-client privilege, the court noted that the attorney believed she was providing privileged legal advice to the client as was evidenced by the bolded and capitalized letters on the top of the letter which stated "PRIVILEGED AND CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEGED."¹²⁶ The court was further persuaded by the fact that the attorney testified in an affidavit that she viewed the board of trustees as a client because she had been asked to represent the hospital in the peer review process and because she knew that hospital boards of directors in the Healthtrust corporate family delegated peer review authority to the boards of trustees of the hospitals involved.¹²⁷ Although the court did find that the letter was protected by attorney-client privilege, it found that the privilege was waived under both the strict accountability tests and the balancing approach.¹²⁸

Other documents to which the defendant claimed a privilege included communications between American Medtrust and Healthtrust. After the hospital imposed limitations on Dr. Draus' privileges, the hospital sent three reports to the National Practitioners Data Bank.¹²⁹ After the reports were sent, control of the

123. 172 F.R.D. 384 (S.D. Ind. 1997).

124. *Id.* at 385.

125. *Id.* at 386.

126. *Id.*

127. *Id.*

128. *Id.* at 387-88. The test of strict accountability holds that nearly any disclosure of the communication waives the privilege. *See, e.g., In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989). The balancing approach considers the following five factors in deciding whether the privilege has been waived as to a particular communication: (1) the reasonableness of the precautions taken to prevent inadvertent disclosures; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the "overriding issue of fairness." *Draus*, 172 F.R.D. at 387 (citing *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179, 183 (N.D. Cal. 1990)).

129. The National Practitioners Data Bank, administered by the federal government, serves as a central repository for information regarding actions taken against physicians due to poor quality of care issues.

hospital changed from Healthtrust to American Medtrust, Inc. Dr. Draus then protested the reports with the Data Bank and the Data Bank asked the hospital, now under control of American Medtrust, for a response to the protest. Because American Medtrust no longer owned the hospital when the reports were filed with the Data Bank, American Medtrust looked to Healthtrust for information and guidance. In response to American Medtrust's request for information and guidance, attorneys for each of the companies communicated with one another concerning the response to the protests, and non-lawyer executives of both companies were advised of the circumstances.¹³⁰

In response to the plaintiff's motion to compel, Healthtrust asserted that the communications were protected because the two separate clients shared a community of interest with respect to the potential litigation.¹³¹ The court denied the plaintiff's motion to compel and followed the reasoning of the Seventh Circuit and other federal courts which have recognized that the attorney-client and work-product privileges may extend to communications among persons who share a joint legal interest in the subject matter of the communications.¹³² The key consideration examined by the court was whether the nature of the interest is identical, not similar, and whether the representation is legal, not solely commercial.¹³³

Finally, the court found that communication between the attorney hired to represent the hospital and the attorney hired by the hospital to represent the hearing committee in the Draus matter was not protected by the attorney-client privilege.¹³⁴ The court analogized the hearing committee to administrative agencies that employ both administrative law judges and attorneys who represent the agency in enforcement actions and hearings before those administrative law judges.¹³⁵

130. *Draus*, 172 F.R.D. at 391.

131. *Id.* The court noted that a community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of the communication between an attorney and a client concerning legal advice. *Id.*

132. *Id.* See *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979); *Anderson v. Torrington Co.*, 120 F.R.D. 82, 86 (N.D. Ind. 1987); *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 191 (N.D. Ill. 1985). The court also noted that Indiana courts appear to recognize the extension of the attorney-client and work-product privileges to communications within a group with a community of legal interest in the context of potential litigation. *Draus*, 172 F.R.D. at 391 (citing *Corll v. Edward D. Jones & Co.*, 646 N.E.2d 721, 725 (Ind. Ct. App. 1995)).

133. *Draus*, 172 F.R.D. at 391.

134. *Id.* at 392. A hearing committee presides over an adversary hearing where opposing parties (who may be represented by counsel) present evidence, cross examine witnesses and argue their cases. *Id.*

135. *Id.*

D. The Scope and Extent of the Health Care Provider's Duty

The Indiana Supreme Court decided a case during the survey period that questioned the extent of the duty owed by a health care provider to an unknown non-patient who was allegedly injured by the health care provider's treatment of a patient. In *Cram v. Howell*,¹³⁶ a patient visited Dr. Howell's office where he was administered various immunizations and vaccinations.¹³⁷ Subsequent to being vaccinated, the patient experienced two episodes of loss of consciousness while still at Dr. Howell's office.¹³⁸ Later, while driving himself home from the physician's office, the patient again lost consciousness, resulting in his collision with the plaintiff, Gregory Cram.¹³⁹ Cram sustained severe injuries in the collision that subsequently resulted in Cram's death.¹⁴⁰

Cram's personal representative filed a medical malpractice action against Dr. Howell before the Indiana Department of Insurance pursuant to the provisions of the Indiana Medical Malpractice Act.¹⁴¹ Thereafter, Cram's personal representative filed a motion for preliminary determination of law and a proposed wrongful death complaint with the trial court¹⁴² alleging that Dr. Howell failed to properly monitor the patient and failed to warn the patient of the dangers of driving a vehicle in his apparent condition.¹⁴³ The personal representative further alleged that Dr. Howell owed a duty of care to Cram that was breached through Dr. Howell's negligent treatment of the patient.¹⁴⁴ By his motion, the personal representative requested that the trial court find, as a matter of law, that Dr. Howell owed a duty to Cram.¹⁴⁵

The trial court dismissed the proposed complaint pursuant to Trial Rule 12(B)(6) finding that the proposed complaint did not state a cause of action upon which relief could be granted for the reason that, as a matter of law, Dr. Howell did not owe a duty to Cram.¹⁴⁶ The trial court's dismissal of the proposed complaint was affirmed by the Indiana Court of Appeals.¹⁴⁷

In reversing the trial court's dismissal, the Indiana Supreme Court noted its prior decision in *Webb v. Jarvis*,¹⁴⁸ which also involved the determination of a

136. 680 N.E.2d 1096 (Ind. 1997).

137. *Id.* at 1097.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1096-97.

142. Under the provisions of the Malpractice Act, a trial court has limited jurisdiction to make preliminary determination on certain issues of law prior to the issuance of an opinion by a medical review panel. IND. CODE § 27-12-11-1 (1993).

143. *Cram*, 680 N.E.2d at 1097.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Cram v. Howell*, 662 N.E.2d 678 (Ind. Ct. App. 1996).

148. 575 N.E.2d 992 (Ind. 1991).

physician's duty to a third party who was not a patient of the physician.¹⁴⁹ In *Webb*, the supreme court balanced three factors in determining whether the physician owed a duty to the victim of his patient's subsequent violent acts which included: "(1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person who was injured; and (3) public policy concerns."¹⁵⁰ Applying the balancing test, the court in *Webb* affirmed summary judgment in favor of the defendant physician and stated that "generally physicians do not owe a duty to unknown nonpatients who may be injured by the physician's treatment of a patient."¹⁵¹

In *Cram*, the supreme court observed that the application of the balancing test established in *Webb* was necessarily case specific.¹⁵² The supreme court then distinguished the facts of *Cram* on both the foreseeability and the public policy issues embodied in the second and third factors of the *Webb* balancing test.¹⁵³

With respect to foreseeability, the court noted that Dr. Howell allegedly had actual knowledge that the medication administered to his patient caused two episodes of loss of consciousness.¹⁵⁴ Thus, the court determined that it was reasonably foreseeable that injury would result to third persons if the patient operated a motor vehicle.¹⁵⁵

As to public policy concerns, the court stated that the complaint in *Cram* did not assert that Dr. Howell should not have administered the medication to his patient. Rather, the plaintiff merely alleged that Dr. Howell should have monitored the patient for a longer period of time before allowing him to leave the office and should have warned the patient of the potential dangers of operating a motor vehicle.¹⁵⁶ Therefore, in the court's view, the imposition of a legal duty on Dr. Howell relative to the plaintiff did not infringe upon Dr. Howell's professional obligation to treat his patient as was determined to be the case in *Webb*.¹⁵⁷

Applying the *Webb* analysis to the facts alleged in the complaint, the court concluded that "the defendant physician here owed a duty of care to take reasonable precautions in monitoring, releasing, and warning his patient for the

149. *Cram*, 680 N.E.2d at 1097. In *Webb*, a physician allegedly overprescribed a medication that caused the patient to become a toxic psychotic and to be unable to control his rage. *Webb*, 575 N.E.2d at 994. During one of the toxic episodes, the patient shot a third person who then sued the physician claiming that the physician owed him a duty. *Id.*

150. *Cram*, 680 N.E.2d at 1097. The court specifically noted that the three factors employed in the *Webb* analysis are used in a balancing approach rather than as three distinct and necessary elements. *Id.*

151. *Id.* (quoting *Webb*, 575 N.E.2d at 998).

152. *Cram*, 680 N.E.2d at 1097.

153. *Id.* at 1098. The court noted initially that the relationship between *Cram* and Dr. Howell was similar to the relationship between the defendant physician and the injured plaintiff in *Webb*.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

protection of unknown third persons potentially jeopardized by the patient's driving upon leaving the physician's office."¹⁵⁸ The supreme court remanded the case to the trial court for further proceedings consistent with its opinion.

E. Requirements for Recovery of Emotional Damages in a Medical Malpractice Case

In *Etienne v. Caputi*,¹⁵⁹ the Indiana Court of Appeals considered a unique claim for damages in a medical malpractice case. Ms. Etienne brought a claim for medical malpractice against several of her treating physicians, including Dr. Caputi, for failure to diagnose and recommend appropriate follow-up care for her subsequently diagnosed breast cancer.¹⁶⁰ Upon diagnosis of the breast cancer, Ms. Etienne was required to undergo chemotherapy as well as a modified left radical mastectomy.¹⁶¹ According to the proposed complaint filed under the Malpractice Act, Dr. Caputi allegedly failed to properly interpret a mammogram ordered by Ms. Etienne's primary care physician.¹⁶²

In accordance with the requirements of the Malpractice Act, Ms. Etienne's claim was submitted to a duly constituted medical review panel.¹⁶³ The panel issued an expert opinion finding that, although Dr. Caputi's reading of the mammogram did not meet the applicable standard of care, his medical negligence was not a causative factor of the alleged injuries.¹⁶⁴

Ms. Etienne thereafter filed a complaint in court that included Dr. Caputi as a named defendant.¹⁶⁵ The complaint alleged a claim for medical negligence as well as a claim for negligent infliction of emotional distress.¹⁶⁶ Dr. Caputi filed a motion for summary judgment asserting that, even assuming he had negligently read or interpreted Ms. Etienne's mammogram, his negligence did not cause the alleged injuries.¹⁶⁷ The trial court ultimately granted Dr. Caputi's motion for summary judgment and dismissed the complaint on all claims presented on the basis that Ms. Etienne had failed to present a genuine issue of material fact on the

158. *Id.* The court also noted the procedural distinction between the case at bar and *Webb*. *Webb* came on appeal from the grant of a motion for summary judgment. *Cram* came to the court on a dismissal under Trial Rule 12(B)(6) for failure to state a claim upon which relief could be granted. The court observed that dismissals under Trial Rule 12(B)(6) are “improper unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts.” *Id.* (quoting *Obremski v. Henderson*, 497 N.E.2d 909, 910 (Ind. 1986)).

159. 679 N.E.2d 922 (Ind. Ct. App. 1997).

160. *Id.* at 923.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 925.

167. *Id.* at 923.

issue of causation.¹⁶⁸

On appeal, Ms. Etienne contended, among other things, that the trial court erred in granting summary judgment on her claim for negligent infliction of emotional distress for the reason that Indiana's modified impact rule allows pursuit of a distinct claim for negligent infliction of emotional distress despite the outcome on the claim for medical negligence.¹⁶⁹

In approaching the issue, the Indiana Court of Appeals opined that the proper analysis of the plaintiff's claim for negligent infliction of emotional distress was governed by *Shuamber v. Henderson*,¹⁷⁰ in which the Indiana Supreme Court modified the traditional requirement that a plaintiff's alleged claim for emotional damages be accompanied by and result from physical injury caused by an impact to the person seeking recovery.¹⁷¹

The court noted that the Etientes were not seeking emotional damages as a result of physical injury.¹⁷² The emotional damages sought were, rather, based upon Ms. Etienne's assertion that she suffered emotional distress and turmoil associated with a continuing fear of misdiagnosis and the potential reoccurrence of her cancer.¹⁷³

Although *Shuamber* dispensed with the requirement that a plaintiff's emotional damages arise out of or be accompanied by physical injury, the court in *Etienne* observed that the modified rule continues the requirement of a direct physical impact upon the plaintiff seeking recovery of emotional damages.¹⁷⁴ Applying the modified impact rule of *Shuamber*, the court stated:

In Etienne's case, no physical touching occurred. Instead, the alleged emotional damages arose as a result of Dr. Caputi's incorrect reading of Nancy's mammogram. . . . We do not see the direct physical impact or direct involvement necessary for the application of the modified impact rule. We can deny summary judgment on this issue only by ignoring the direct physical impact requirement of the modified impact rule. As our

168. *Id.*

169. *Id.* at 925.

170. 579 N.E.2d 452 (Ind. 1991).

171. *Id.* at 455. In *Shuamber*, the Indiana Supreme Court stated the modified impact rule as follows:

When, as here, a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.

Id. at 456.

172. *Etienne*, 679 N.E.2d at 926. The emotional damages sought by the Etientes were apparently not based upon Ms. Etienne's chemotherapy or the mastectomy. *Id.*

173. *Id.*

174. *Id.*

supreme court established this rule, we are not free to ignore it.¹⁷⁵

Accordingly, the court affirmed the trial court's entry of summary judgment in favor of Dr. Caputi on the plaintiffs' claim for negligent infliction of emotional distress.

F. Informed Consent

In *Auler v. Van Natta*,¹⁷⁶ a case of first impression in Indiana, the court of appeals evaluated the extent of a hospital's duty to obtain a patient's informed consent to surgery. In *Auler*, the patient was admitted to the hospital for removal of her breast and reconstructive surgery, following her advising the surgeon that she did not want a breast implant.¹⁷⁷ Upon admission to the hospital, the patient signed a general consent form¹⁷⁸ that included the name of the hospital in bold print in the top right portion of the form.¹⁷⁹ The body of the general consent form provided that “[t]he explanation of the operation or special procedure must be given to the patient by the named physician since only he is competent to do so.”¹⁸⁰ The patient's signature on the consent form, directly under a bold print acknowledgment that she had read and understood its content,¹⁸¹ was witnessed by a registered nurse.¹⁸² Nowhere in the consent form did it indicate that a saline breast implant was authorized or contemplated during the surgical procedures.¹⁸³

The surgical procedures were performed on the day the patient signed the general consent form and included the insertion of a saline-filled breast implant.¹⁸⁴ The patient first became aware of the implant the following year when it was discovered during a sonogram examination.¹⁸⁵ The Aulers filed a proposed complaint with the Indiana Department of Insurance against the hospital and the surgeon that resulted in a unanimous opinion from a medical review panel that the hospital had complied with the applicable standard of medical care.¹⁸⁶

Thereafter, the Aulers filed a complaint for medical malpractice in the trial court alleging that the hospital failed to obtain Ms. Auler's informed consent to

175. *Id.*

176. 686 N.E.2d 172 (Ind. Ct. App. 1997).

177. *Id.* at 173.

178. *Id.* The consent form signed by the patient was titled “Consent to Operation or Other Special Procedure.” *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* The procedures indicated in the consent form were described as “Left Modified Radical Mastectomy, Immediate Reconstruction[,] Left Latissimus Dorsi Flap.” *Id.*

184. *Id.*

185. *Id.*

186. *Id.* With respect to the surgeon, the panel concluded that there was a material issue of fact, not requiring expert opinion, concerning the issue of informed consent.

the breast implant procedure.¹⁸⁷ The hospital moved for summary judgment based upon the uncontested opinion in its favor issued by the medical review panel.¹⁸⁸ The trial court granted the hospital's motion and the plaintiffs appealed.¹⁸⁹

The court of appeals observed that, although the duty to obtain the patient's informed consent to medical treatment generally rests with the patient's treating physician,¹⁹⁰ other jurisdictions have held hospitals vicariously liable for a physician's failure to obtain the patient's informed consent.¹⁹¹ Noting that the plaintiffs made no claim of vicarious liability on the part of the hospital for the acts of the surgeon,¹⁹² the court was left to consider two issues: (1) whether the hospital had an independent duty to obtain the patient's informed consent to the implant procedure; and (2) whether the hospital had gratuitously assumed such a duty through its general consent form.¹⁹³

The court rejected the plaintiffs' claim that the hospital possessed a legal duty, separate and distinct from that of the physician, to obtain a patient's informed consent to medical treatment observing:

Typically, courts reach this conclusion after determining that it is the treating physician who has the education, expertise, skill, and training necessary to treat a patient and determine what information a patient must have in order to give informed consent. These courts recognize that nurses and other nonphysician hospital employees do not normally possess knowledge of "a particular patient's medical history, diagnosis, or other circumstances which would enable the employee to fully disclose all pertinent information to the patient."¹⁹⁴

Following the majority position on this issue, the court of appeals concluded that "in the absence of circumstances supporting a claim for vicarious liability

187. *Id.* The surgeon was also named as a defendant in the malpractice complaint but was not a party to the appeal.

188. *Id.*

189. *Id.*

190. *Id.* at 174. The court of appeals noted that the physician's duty to obtain informed consent arises as a matter of law from the relationship between the physician and the patient and "is based upon the patient's right 'to intelligently reject or accept treatment.'" *Id.* (quoting *Revord v. Russell*, 401 N.E.2d 763, 767 (Ind. Ct. App. 1980)). As such, the doctrine of informed consent mandates that the physician "make a reasonable disclosure of material facts relevant to the decision the patient is required to make." *Auler*, 686 N.E.2d at 174 (citing *Culbertson v. Mernitz*, 602 N.E.2d 98, 101 (Ind. 1992)).

191. *Auler*, 686 N.E.2d at 174.

192. *Id.* The plaintiffs did not allege that the surgeon was an employee or agent of the hospital or that the hospital controlled the surgeon's practice. In addition, there was no allegation in the complaint that the hospital was aware of any propensity on the part of the surgeon for not obtaining patients' informed consent. *Id.*

193. *Id.*

194. *Id.* at 175 (quoting *Giese v. Stice*, 567 N.W.2d 156, 163 (1997)).

or other special circumstances, a hospital has no independent duty to obtain a patient's informed consent.”¹⁹⁵ The court of appeals also rejected the plaintiffs' alternative argument that the hospital had assumed the duty to obtain the patient's informed consent to surgery by providing the written consent form and obtaining the patient's signature thereon.¹⁹⁶

The court acknowledged that under the Restatement of Torts¹⁹⁷ and the parallel doctrine in Indiana of assumed duty, “[a] party may gratuitously place himself in such a position that the law imposes a duty to perform an undertaking in a manner which will not jeopardize the safety of others, including third parties.”¹⁹⁸ On the facts presented, however, the court concluded that the hospital did not undertake to secure the patient's informed consent and, therefore, did not assume the physician's duty in that regard.¹⁹⁹ In so holding, the court relied upon the specific language of the written consent form which indicated that the explanation of the medical treatment was the responsibility of the physician since only the physician is competent to give that explanation.²⁰⁰ The court found further support for its conclusion in the fact that the patient had specifically acknowledged in the consent form that the risks and complications had been explained to the patient.²⁰¹ In the court's view, these facts led to the conclusion that the hospital's general consent form was not constructed to replace the informed consent required to be given by the surgeon.²⁰² The court of appeals, therefore, affirmed the trial court's entry of summary judgment in favor of the hospital.²⁰³

195. *Id.*

196. *Id.* at 176.

197. RESTATEMENT (SECOND) OF TORTS § 324A (1965). Section 324A provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

198. *Auler*, 686 N.E.2d at 175 (citing *Harper v. Guarantee Auto Stores*, 533 N.E.2d 1258, 1263 n.4 (Ind. Ct. App. 1989)).

199. *Id.* at 176.

200. *Id.* at 175.

201. *Id.* at 176.

202. *Id.*

203. *Id.*

G. The Requirement of Expert Testimony in Malpractice Actions

The Indiana Court of Appeals examined the need for expert testimony in medical malpractice cases in *Slease v. Hughbanks*.²⁰⁴ In *Slease*, the plaintiff underwent ankle surgery following a work-related injury.²⁰⁵ The day following surgery, a nurse at the hospital noticed a burn on the patient's left thigh which she attributed to the occurrence of the work-related injury and which the patient attributed to the course of his ankle surgery. The patient filed a proposed complaint against the hospital alleging medical malpractice. Following submission of the case to a medical review panel, the panel issued a unanimous decision that the hospital had properly complied with the applicable standard of care.²⁰⁶ Nonetheless, the plaintiff pursued his action in the trial court, and the hospital moved for summary judgment asserting that the patient had failed to present expert testimony controverting the unanimous opinion of the medical review panel the hospital's favor.²⁰⁷ The trial court denied the hospital's motion and the matter was taken on interlocutory appeal to the Indiana Court of Appeals.²⁰⁸ The court of appeals observed that, when a medical review panel issues a unanimous opinion in favor of the health care provider, that is generally sufficient to show that there is no genuine issue of material fact with respect to the claim of medical malpractice.²⁰⁹ Therefore, to successfully oppose a motion for summary judgment, the patient must present expert testimony to show that there is a dispute regarding the appropriate standard of care and the health care provider's compliance with the standard of care.²¹⁰ In the absence of such testimony, the patient generally cannot establish a genuine issue of material fact to survive a motion for summary judgment.²¹¹

The court of appeals, however, noted that there are two exceptions to the expert testimony requirement in medical malpractice cases.²¹² The two exceptions are the common knowledge exception and the theory of *res ipsa loquitur*.²¹³ The court of appeals refused to apply either exception to the facts before it. The court observed that the common knowledge exception to the expert testimony requirement generally applies when a jury can fully understand the conduct and the breach of duty without technical explanation.²¹⁴ The court further observed, however, that the application of the common knowledge exception has traditionally been limited to cases that involve foreign objects

204. 684 N.E.2d 496 (Ind. Ct. App. 1997).

205. *Id.* at 498.

206. *Id.*

207. *Id.* at 500.

208. *Id.* at 498.

209. *Id.* at 499.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

being left in the body following surgery.²¹⁵ Such incidents are not the intended results of the operative procedure and do not require expert testimony to establish a breach of the health care provider's duty.²¹⁶

The patient argued that a jury did not require expert testimony to understand that a patient should not sustain a burn during ankle surgery. The court of appeals, however, viewed the issue as framed by the patient to be an oversimplification. According to the court of appeals, the real issues presented were "whether the burn was caused by an instrument or technique used during the surgery and whether the instrument or technique was misused or whether burns are a common and expected result."²¹⁷ Under this formulation of the issues, the court concluded that a jury was incapable of understanding the proper tools and techniques to be used during surgery without expert testimony.²¹⁸

The court also rejected the plaintiff's claim that the facts of his case fell within the doctrine of *res ipsa loquitur*.²¹⁹ The rule of *res ipsa loquitur* is evidentiary in nature and allows an inference of negligence to be drawn from the facts surrounding the particular injury.²²⁰ The elements for application of the doctrine include: "(1) that the injury is one which does not ordinarily occur in the absence of negligence; (2) the injury was caused by an instrumentality over which the defendant had exclusive control; and (3) the injury was not due to any voluntary act of the plaintiff."²²¹ The court observed that it is not necessary for a plaintiff to demonstrate actual control over a particular instrumentality or that the plaintiff eliminate all possible causes of the injury for the application of the doctrine of *res ipsa loquitur*. Rather, it is the right of control and the opportunity to exercise control that governs; the patient is merely required to demonstrate that any reasonably probable causes for the injury were under the control of the defendant.²²² It is then left with the jury to determine which, if any, instrumentality actually caused the injury. The court observed, however, that "if the plaintiff cannot specifically identify any potential causes and show that they were within the exclusive control of the defendant his *res ipsa loquitur* claim must fail."²²³

Applying the doctrine to the facts then before it, the court of appeals concluded that the patient had failed to present any evidence concerning possible causes of the burn.²²⁴ Although the patient argued that a "bovie pad" used during his operation was the cause of the burn, the court noted that there was nothing in the patient's designated evidence to show that the bovie pad had the potential to

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* (citing *Widmeyer v. Faulk*, 612 N.E.2d 1119 (Ind.Ct.App. 1993)).

222. *Id.*

223. *Id.*

224. *Id.* at 500.

cause a burn like he allegedly received during surgery.²²⁵ Having failed to present any evidence regarding the cause of the burn, the court concluded that the patient had failed to sustain his burden of proving the application of the doctrine of *res ipsa loquitur*.²²⁶ As such, the patient had failed to demonstrate the existence of a genuine issue of material fact to preclude summary judgment.²²⁷ The court of appeals reversed the trial court and directed entry of summary judgment in favor of the hospital.²²⁸

II. LABOR/EMPLOYMENT

The Seventh Circuit Court of Appeals has recently narrowed the reach of federal employment discrimination laws by ruling that an independent contractor physician with staff privileges could not bring an employment discrimination claim against the hospital at which he worked.²²⁹ In *Alexander*, the court ruled that an independent contractor physician who had staff privileges at a hospital could not bring a discrimination claim against the hospital under Title VII of the Civil Rights Act of 1964²³⁰ by noting that Title VII protects only individuals who are "employees" and does not extend to independent contractors.²³¹

Alexander involved Dr. Mark Alexander, an Egyptian-born Muslim anesthesiologist, who had staff privileges at Rush North Shore Medical Center in Chicago, Illinois.²³² As a condition of his privileges, Dr. Alexander was required to spend a specified number of hours per week "on call" in the hospital's emergency room.²³³ According to the hospital's policy, a physician on call was required to be available by pager or phone, to call the hospital within twenty minutes of being paged, and to come to the hospital if requested to do so by the emergency room physician on duty.²³⁴ Following one of Dr. Alexander's on-call rotations, an emergency room physician filed a complaint alleging that Dr. Alexander had refused to come to the hospital after having been requested to do so by the emergency room physician.²³⁵ Following its investigation of the incident, the hospital's board of trustees informed Dr. Alexander that his staff

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487 (7th Cir. 1996).

230. 42 U.S.C. § 2000e (1994).

231. *Alexander*, 101 F.3d at 492; *see also Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996). These decisions held that a plaintiff must prove the existence of an employment relationship in order to maintain a Title VII action against the defendant and that independent contractors are not protected by Title VII. *Knight*, 950 F.2d at 380; *accord Ost*, 88 F.3d at 440.

232. *Alexander*, 101 F.3d at 488, 489.

233. *Id.* at 489.

234. *Id.*

235. *Id.*

privileges had been revoked for violation of the hospital's on-call policy.²³⁶ Dr. Alexander filed a discrimination complaint alleging that the hospital had revoked his staff privileges not because he had violated the hospital's on-call policy, but because of his religion and national origin.²³⁷

The court noted that Title VII applies only to "employees," not independent contractors of the employer.²³⁸ Because Title VII's definition of "employee" was vague, the court applied the five-part test which was used in both the *Ost* and *Knight* cases to determine whether an individual is an employee for purposes of the Act.²³⁹ While noting that all five factors are to be considered in the determination of whether an individual is an employee or an independent contractor, the court considered the employer's right to control as the most important.²⁴⁰

In applying the five-part test to Dr. Alexander's relationship with the hospital, the court found that Dr. Alexander was an independent contractor rather than an employee.²⁴¹ Specifically, the court looked to the following factors in its determination that Dr. Alexander was an independent contractor: he possessed significant specialized skills; he listed as his employer on his income tax return his personal, wholly-owned professional corporation that was responsible for paying his malpractice insurance premiums, employment benefits and income and social security taxes; he was responsible for billing his patients and collecting his fees directly from them; he never received compensation, paid vacation, private office space, or other paid benefits from the hospital; he had the authority to exercise his own independent discretion concerning the care he delivered to his patients; he was not required to admit his patients to the hospital; and he was free to associate himself with other hospitals if he wished to do so.²⁴² The court rejected Dr. Alexander's argument that he was an employee because he was required to spend a specified amount of time per week on call and because, by virtue of the nature of being an anesthesiologist, most of his operating room patients were assigned to him on a daily basis by the hospital.²⁴³

236. *Id.*

237. *Id.*

238. *Id.* at 494.

239. *Id.* at 492. The five-part test includes a consideration of the following factors: (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work; (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace; (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace and maintenance of operations; (4) method and form of payment and benefits; and (5) length of job commitment and/or expectations. *Id.* (citing *Ost*, 88 F.3d at 438 (quoting *Knight*, 950 F.2d at 378-79)).

240. *Id.* at 493.

241. *Id.*

242. *Id.*

243. *Id.*

III. HEALTH CARE PROVIDER/PATIENT'S RIGHTS

A. Contract Law: Unenforceability Based Upon Public Policy

During this Survey period, Indiana courts have demonstrated that contracts will not be enforceable if lacking essential formation elements or if they are clearly contrary to public policy. This is of particular note since contracts involving health care entities often present considerable complexities and opportunities to be at variance with federal or state law or regulation especially in areas of fraud and abuse.

A recent Indiana Court of Appeals decision reflects the willingness of Indiana courts to depart from the well-settled principle of freedom to contract in light of public policy considerations. The Fifth Circuit Court of Appeals, in *DeKalb Chiropractic Center, Inc. v. Bio-Testing Innovation, Inc.*,²⁴⁴ refused to enforce the terms of a medical equipment lease between a medical equipment company and a chiropractor because the terms of the contract violated public policy. The Fifth Circuit's decision indicates that courts are willing to limit or strictly construe contracting rights when contractual terms tend to impugn the integrity of the physician/patient relationship.

In *DeKalb Chiropractic Center*, an Indiana corporation that leases medical equipment entered into a contract with DeKalb Chiropractic Center, Inc. ("Center"). The contract provided for the lease of two strength-testing units to the Center and required the Center to perform a minimum number of billable examinations per week using the equipment, without regard to patient need for such testing. The Center failed to perform the minimum billable examinations required by the contract, and Bio-Testing sued for breach of contract. The trial court awarded Bio-Testing \$11,975 in damages for breach of the minimum testing requirements and \$2,552.25 in attorneys' fees.²⁴⁵

The Center appealed, claiming that the leasing arrangement requiring the Center to perform a minimum number of billable tests per week whether or not such tests were necessary, was contrary to public policy and therefore unenforceable.²⁴⁶ The Indiana Court of Appeals reversed the trial court's decision.²⁴⁷

The Fifth Circuit noted that courts have generally declined to unnecessarily restrict a person's freedom to contract.²⁴⁸ However, despite this "very strong presumption of enforceability,"²⁴⁹ courts have refused to enforce contracts that contravene statute, injure the public in some way, or are otherwise contrary to the public policy of Indiana.²⁵⁰ In reviewing the contract between Bio-Testing and

244. 678 N.E.2d 412 (Ind. Ct. App. 1997).

245. *Id.* at 414.

246. *Id.*

247. *Id.* at 415.

248. *Id.* at 414.

249. *Id.*

250. *Id.*

the Center, the Fifth Circuit held that the minimum testing requirements contained in the contract violated public policy in two important respects.²⁵¹

First, the minimum testing requirements violated the integrity of the physician/patient relationship as the agreement required the Center to conduct a minimum number of tests each week without regard to the actual needs of the Center's patients.²⁵² In requiring the doctors to either perform a prescribed number of tests each week or risk breaching the contract, the agreement prevented the Center's doctors from using their own professional judgment and discretion in treating their patients. Because the contract intruded upon the doctor/patient relationship, the Fifth Circuit determined it was in violation of public policy, and therefore, unenforceable.²⁵³

Finally, the court held that the minimum testing requirements contained in the contract also conflicted with Indiana's policy of containing health care costs.²⁵⁴ Under the terms of the contract, the Center was required to conduct a certain number of tests and provide the billing information to Bio-Testing, and would then receive a share of the insurance proceeds following Bio-Testing's submission to the insurance company. Bio-Testing was expected to receive between \$250,000 and \$300,000 for tests performed on equipment that cost Bio-Testing only \$12,000. The Court found that the fees contemplated by the contract more than covered the cost of Bio-Testing's original purchase and chiropractic center's use of the medical equipment.²⁵⁵ As such, the court noted that the terms of the contract contravene Indiana's public policy of containing health care costs because the terms exploit the health insurance industry by unnecessarily charging insurers, thereby increasing the cost of health care and jeopardizing equal access to health care.²⁵⁶ Because the court determined that the lease agreement violated important public policy, it was held to be unenforceable.²⁵⁷

B. Determining Parties Responsible for Reimbursement

In *Porter Memorial Hospital. v. Wozniak*,²⁵⁸ the Indiana Court of Appeals held that a spouse may be secondarily liable for medical expenses under the doctrine of necessities.²⁵⁹ In *Wozniak*, Mrs. Wozniak required medical care that resulted in a hospital bill of \$44,301.12. Subsequent to her discharge and prior to paying her hospital bill, Mrs. Wozniak filed bankruptcy. The Hospital filed suit against Mr. Wozniak for the hospital bill claiming that he was responsible

251. *Id.* at 414-15.

252. *Id.* at 415.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. 680 N.E.2d 13 (Ind. Ct. App. 1997).

259. *Id.* at 16.

for his wife's medical expenses under the doctrine of necessities.²⁶⁰

The trial court entered judgment in favor of Mr. Wozniak, holding that because Mrs. Wozniak's debt had been extinguished by her bankruptcy, there was no debt for which Mr. Wozniak could be secondarily liable.²⁶¹ The trial court relied on *In re Lundberg*²⁶² in granting Mr. Wozniak's summary judgment. *Lundberg* involved a creditor attempting to sue the debtor's insurer. Under Tennessee law, the creditor was required to first obtain a judgment of liability against the insured before the creditor could sue the insurer. The creditor in *Lundberg* was attempting to reopen the debtor's bankruptcy proceedings in order to obtain a judgment of liability against the debtor. The *Lundberg* court ruled that because the debtor's liability had not already been established prior to the closing of the bankruptcy proceedings, the insurer could not be deemed liable.²⁶³ Relying upon the *Lundberg* court's reasoning, the trial court ruled that the bankruptcy proceedings extinguished Mrs. Wozniak's debt, and therefore, like the insurer in *Lundberg*, Mr. Wozniak was not liable for his wife's medical expenses.²⁶⁴

The appellate court disagreed with the trial court's decision, and held that Mr. Wozniak may be secondarily liable for his wife's medical expenses under the doctrine of necessities, even though his wife's debt had been discharged in bankruptcy.²⁶⁵ The appellate court rejected the trial court's analysis, and held that *Lundberg* was inapplicable to the facts in *Wozniak*.²⁶⁶ *Lundberg* stands for the rule that a bankruptcy proceeding need not be reopened to allow a creditor to obtain a judgment against the debtor in order to then pursue a separate suit against the debtor's insurance carrier.²⁶⁷ In the present case, the Hospital was not attempting to reopen a bankruptcy proceeding to establish Mrs. Wozniak's liability; rather, it was attempting to collect a pre-existing debt from Mr. Wozniak.²⁶⁸ Thus, although Mrs. Wozniak's debt was discharged in bankruptcy, it does not cancel Mr. Wozniak's obligation.²⁶⁹

However, because Mr. Wozniak did not agree to be primarily liable for his wife's medical expenses, the appellate court used the doctrine of necessities to determine whether Mr. Wozniak was secondarily liable. The court found that the expenses medically necessary were "necessary expenses" under the doctrine of necessities.²⁷⁰ Further, because there was a shortfall in Mrs. Wozniak's funds due to her bankruptcy, Mr. Wozniak was potentially secondarily liable for the

260. *Id.* at 14.

261. *Id.* at 15.

262. 152 B.R. 316 (Bankr. E.D. Okla. 1993).

263. *Id.* at 319.

264. *Wozniak*, 680 N.E.2d at 14.

265. *Id.* at 16.

266. *Id.* at 15.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 16.

medical expenses under the doctrine of necessities.²⁷¹ A factual question remained as to the extent of Mr. Wozniak's liability. The appellate court remanded the issue to the trial court for further proceedings.²⁷²

IV. LEGISLATION—STATE

A. Modification of County Hospital Statutes

The Indiana General Assembly continues to consider health care issues worthy of increasing legislative and regulatory oversight and guidance. Several laws provided protection for patients as managed care enrollees and in health care settings by requiring grievance procedures for patient complaints and criminal background checks for certain health care employees. Other laws mandated health insurance availability for persons suffering from certain illnesses or diseases and provided protections for release of medical records and informed consents for mental health treatment. These changes appear to reflect public input into the legislative process regarding the importance of health care to the public and the increasing willingness of elected officials to seek to improve the system by intervention.

Effective July 1, 1997, House Enrolled Act 1826²⁷³ made several significant changes affecting the organization and operation of county-owned hospitals. The newly revised statute provides that county hospitals proposing leases in conjunction with publicly-financed projects are not subject to remonstrance procedures under current law²⁷⁴ if they comport with the public notice requirements of sections 6-1.1-20-3.1 to 3.2 of the Indiana Code.²⁷⁵

County hospitals organized under the Acts of 1917, with the approval of the county executive, are now permitted to increase or decrease the size of the governing board from a range of four members to nine members.²⁷⁶ A decrease in board size may occur only when there exists a vacancy on the board.²⁷⁷ Boards of county hospitals now must meet a minimum of ten times a year rather than monthly as previously required.²⁷⁸ A county hospital board may now include productivity bonuses as a part of compensation arrangements for employees and the amounts are not subject to existing limits on amounts expended for productivity or morale of personnel, volunteers or physicians.²⁷⁹ The statute also authorizes county hospitals to conduct business in states adjacent to Indiana.²⁸⁰

271. *Id.*

272. *Id.*

273. Act of May 13, 1997, 1997 Ind. Acts 1399, 1399-1414 (effective July 1, 1997).

274. 1997 Ind. Acts at 1414 (amending IND. CODE § 16-22-6-20(b)).

275. *Id.*

276. *Id.* at 1402 (amending IND. CODE § 16-22-2-7(a)).

277. *Id.* at 1404 (amending IND. CODE § 16-22-2-7(b)).

278. *Id.* at 1406 (amending IND. CODE § 16-22-2-9(f)).

279. *Id.* at 1407 (amending IND. CODE § 16-22-3-11(3)(B)).

280. *Id.* at 1408 (amending IND. CODE § 16-22-3-11(12)).

and affords hospital board members and county officials immunity from liability with regard to the sale or lease of county hospitals subject to prior conformance with applicable statutes regarding sales and leases.²⁸¹ County hospital boards may conduct executive sessions under the "Indiana Open Door Law"²⁸² and permissible activities and deliberations may include strategic planning and motivational retreats provided official action is not taken during the meetings.²⁸³

B. Grievance Procedures for HMO Enrollees

House Enrolled Act 1663,²⁸⁴ effective July 1, 1997, made several important additions to existing law regarding health maintenance organizations ("HMOs"). Most notably, the Indiana Department of Insurance, which regulates HMOs, is now empowered to ensure that providers of services offered to enrollees of an HMO, post in conspicuous public locations, a written description or notice of the enrollee's right to pursue grievance procedures against the HMO.²⁸⁵ The HMO is also required to inform its enrollees of its grievance procedures.²⁸⁶ These grievance procedures include a requirement that every HMO have a toll free number which is available and staffed a minimum of forty business hours a week for enrollee use.²⁸⁷ Further, the HMO, except in unusual circumstances, must resolve grievances within twenty calendar days from the enrollee's grievance filing date.²⁸⁸ The HMO must also afford the enrollee appeal rights in the event of an adverse determination.²⁸⁹ The HMO must establish an appeals panel which must make a final determination regarding the enrollee's grievance not later than forty-five days after the appeal is filed.²⁹⁰ The Department is required to file an annual report listing the grievance procedures of all certified HMO's as well as the number of grievances filed with each HMO.²⁹¹

C. Drug Testing for Newborns

Senate Enrolled Act 6(ss) passed during the special session of the 1997 Indiana General Assembly.²⁹² It provides in part that the Indiana State Department of Health oversee testing of newborns for drugs by a contract with an independent laboratory.²⁹³ The laboratory will test meconium samples

281. *Id.* at 1409 (amending IND. CODE § 16-22-3-17(f), (g)).

282. IND. CODE § 16-22-3-28(d) (1993 & Supp. 1997).

283. 1997 Ind. Acts at 1413 (amending IND. CODE § 16-22-3-28(c)(4), (5)).

284. Act of May 12, 1997, 1997 Ind. Acts 2782, 2782-89 (effective July 1, 1997).

285. 1997 Ind. Acts at 2784 (amending IND. CODE § 27-13-10-4(c)).

286. *Id.* at 2783 (amending IND. CODE § 27-13-10-4(a)).

287. *Id.* at 2784 (amending IND. CODE § 27-13-10-5(b)(1)-(3)).

288. *Id.* at 2785 (amending IND. CODE § 27-13-10-7(c)).

289. *Id.* (amending IND. CODE § 27-13-10-7(d)(3)).

290. *Id.* at 2786-87 (amending IND. CODE § 27-13-10-8(b), (c)).

291. *Id.* at 2782-83 (amending IND. CODE § 27-13-8-2(b)(1)-(2)).

292. Act of May 28, 1997, 1997 Ind. Acts 3324, 3324-3581 (effective July 1, 1997).

293. *Id.*

obtained from certain newborns. Meconium accumulates in the bowel of the fetus and is discharged shortly after birth. The infants will be tested for the presence of controlled substances in the child's meconium if the birth rate of the child is less than 2,500 grams and the infant's head are smaller than the third percentile for that infant's normal gestational age and there are no medical explanations for such conditions.²⁹⁴ Hospitals and physicians are required to take meconium samples from infants born under their care that meet the parameters of the statute and forward the samples to a laboratory designated by the Indiana State Department of Health.²⁹⁵

D. Requirements for Alzheimer and Dementia Specialty Care

House Enrolled Act 1300,²⁹⁶ effective July 1, 1997, requires that those health facilities providing special services for residents with Alzheimer's Disease or dementia must make specific reports to the Division of Mental Health of the Indiana Family and Social Services Administration.²⁹⁷ The reports are required of those health facilities providing specialized care to these patients if the facility locks, secures, segregates, or otherwise provides a special program or unit for services to such residents and advertise, market or promote the facility as providing such services.²⁹⁸

A health facility subject to the Act is required to submit written reports on forms provided by the Division of Mental Health detailing the health facility's mission or philosophy, the process and criteria used to place, transfer, or discharge such patients, and the process for the assessment, establishment, and implementation of plans of care.²⁹⁹ A facility is also required to provide information regarding staffing ratios, qualifications, and required training of staff.³⁰⁰

The facility is also required to detail other specific policies regarding restraints, charges and fees, activities and services available, and the characteristics that the facility identifies as distinguishing it from other health facilities.³⁰¹

E. Various Health Insurance Provisions

Effective January 1, 1998, persons diagnosed with diabetes are required to be covered under health insurance policies pursuant to Senate Enrolled Act 184.³⁰² Specifically, a health insurance plan must provide coverage to an insured

294. *Id.*

295. *Id.*

296. Act of May 13, 1997, 1997 Ind. Acts 2058, 2058-60 (effective July 1, 1997).

297. *Id.*

298. 1997 Ind. Acts at 2059 (amending IND. CODE § 12-10-5.5-1(1)-(2)).

299. *Id.* (amending IND. CODE § 12-10-5.5-3(1)-(3)).

300. *Id.* at 2059-60 (amending IND. CODE § 12-10-5.5-3(4)).

301. *Id.* at 2060 (amending IND. CODE § 12-10-5.5-3(6)-(10)).

302. Act of April 16, 1997, 1997 Ind. Acts 2779, 2779-81 (effective January 1, 1998).

for medically-necessary treatment for diabetes³⁰³ and the insured may not be required to pay an annual deductible or co-payment that is greater than that normally associated with similar benefits under the plan.³⁰⁴ The statute also requires that health insurance must provide coverage for diabetes self-management training subject to certain limitations relating to the number of visits and comparable coverage in a health insurance plan which limits the use of participating providers of service.³⁰⁵ House Enrolled Act 1684³⁰⁶ obligates entities issuing policies of accident or sickness insurance to cover items and services incident to mastectomy procedures.³⁰⁷ This Act also proscribes the use of genetic testing by such entities in processing applications for coverage or in determining the insurability of an applicant.³⁰⁸

Effective July 1, 1997, Senate Enrolled Act 225³⁰⁹ specifies that an insurer need not provide coverage for a newly born child of an insured if the pregnancy resulting in the birth commenced prior to the issuance of the insurance policy.³¹⁰

F. Informed Consent Required for Certain Mental Health Services

Effective July 1, 1997, Senate Enrolled Act 309³¹¹ specifies informed consent requirements prior to the provision of mental health services. Before such services are rendered, a mental health provider³¹² must obtain a consent from each patient.³¹³

A mental health provider is only required to obtain one consent for mental health services from a patient even if the services are provided in several locations.³¹⁴ The mental health provider must inform each patient about the provider's training and credentials, the reasonably foreseeable risks and relative benefits of the proposed treatments and alternative treatments available if any.³¹⁵ Further, the patient must be informed of the right to withdraw consent for treatment at any time.³¹⁶ A physician licensed under section 25-22.5 of the Indiana Code must obtain a written consent signed by the patient or the patient's authorized representative prior to treatment being undertaken.³¹⁷

303. 1997 Ind. Acts at 2780 (amending IND. CODE § 27-8-14.5-4).

304. *Id.* (amending IND. CODE § 27-8-14.5-5(a)).

305. *Id.* at 2780-81 (amending IND. CODE § 27-8-14.5-6(a)-(c)).

306. Act of May 12, 1997, 1997 Ind. Acts 2451, 2451-2464 (effective January 1, 1998).

307. 1997 Ind. Acts at 2460 (amending IND. CODE § 22-8-5-26(d)).

308. *Id.* at 2462 (amending IND. CODE § 27-8-26-5).

309. Act of May 6, 1997, 1997 Ind. Acts 2777, 2777-78 (effective July 1, 1997).

310. 1997 Ind. Acts at 2778 (amending IND. CODE § 27-8-5.6-2(b)).

311. Act of April 17, 1997, 1997 Ind. Acts 2448, 2448-51 (effective July 1, 1997).

312. 1997 Ind. Acts at 2448 (amending IND. CODE § 16-36-1.5-2).

313. *Id.* at 2448-49 (amending IND. CODE § 16-36-1.5-4).

314. *Id.* at 2449 (amending IND. CODE § 16-36-1.5-6).

315. *Id.* at 2449-50 (amending IND. CODE § 16-36-1.5-10).

316. *Id.*

317. *Id.* at 2449 (amending IND. CODE § 16-36-1.5-4.5).

G. Release of Mental Health Records

House Enrolled Act 1700 ("Act"),³¹⁸ which was effective July 1, 1997, amends various provisions regarding the release of mental health records.³¹⁹ Section 16-39-5-1 of the Indiana Code provides that health care providers may obtain a patient's mental health records³²⁰ from another provider without the patient's consent if the records are required to provide health services to the patient.³²¹ Since a health record includes alcohol and drug abuse records,³²² providers are permitted to exchange a patient's alcohol and drug abuse records provided that the records do not meet the definition or requirements of a federal law which has additional disclosure requirements.³²³

The Act also specifies circumstances that permit disclosure of a patient's mental health records without the patient's consent.³²⁴ The Act permits disclosure of a patient's mental health records to law enforcement agencies without the patient's consent if the patient is in the custody of a law enforcement officer or agency and the information be released is limited to medications currently prescribed for the patient or the patient's history of adverse medication reactions and the disclosing provider determines that the release of the information will assist in the protection and well being of the patient.³²⁵ Law enforcement agencies receiving such records must maintain their confidentiality.³²⁶

H. Provisions Relating to Various Health Professions and Occupations

Effective July 1, 1997, Senate Enrolled Act 74³²⁷ requires that hypnotists be certified and provides for exclusion from certification requirements various licensed health care providers.³²⁸

House Enrolled Act 1961 ("Act"),³²⁹ effective July 1, 1997, contains numerous provisions concerning licensure for social workers, clinical social workers, marriage and family therapists and certain mental health counselors. The major provisions include a requirement that individuals who practice social work, clinical social work, marriage and family therapy and mental health

318. Act of May 13, 1997, 1997 Ind. Acts 908, 908-19 (effective July 1, 1997).

319. *Id.*

320. 1997 Ind. Acts at 910 (amending IND. CODE § 16-18-2-226).

321. *Id.* at 912 (amending IND. CODE § 16-39-2-6-(1)).

322. *Id.* at 909 (amending IND. CODE §1-1-4-5(5)).

323. *Id.* at 910-11, 914 (amending IND. CODE §§ 16-39-2-6(a)(15)(A), 16-39-1-9).

324. *Id.* at 912 (amending IND. CODE § 16-39-2-6).

325. *Id.* at 913 (amending IND. CODE § 16-39-2-6(a)(7)(D)).

326. *Id.*

327. Act of May 14, 1997, 1997 Ind. Acts 2616, 2616-32 (effective July 1, 1997).

328. 1997 Ind. Acts at 2623-24 (adding IND. CODE § 25-20.5-1-1).

329. Act of May 13, 1997, 1997 Ind. Acts 2391, 2391-2446 (effective July 1, 1997).

counseling must be licensed by January 1, 1999.³³⁰ There is a provision for previously certified individuals to be “grandfathered.”³³¹ The Act further permits social workers, clinical social workers and marriage and family therapists to utilize certain appraisal instruments incident to their work with clients and patients.³³² The Act also specifies that certain acts of such professionals are proscribed and will subject the individual engaging in such activity to disciplinary action by a licensure board.³³³

I. Certificate of Need

House Enrolled Act 1597³³⁴ became effective on July 1, 1997 and re-established Indiana’s certificate of need (“CON”) program until June 30, 1998.³³⁵ The program requires approval for the construction, addition or conversion of beds for use as comprehensive care beds in a comprehensive care facility.³³⁶ Licensed hospitals³³⁷ are permitted to convert up to 50 acute care beds to comprehensive care beds without the necessity of a CON. The Act also address the period of time between July 1, 1996 and June 30, 1997, during which period the certificate of need was not in effect in Indiana. Specifically, the Act provides that projects otherwise subject to the certificate of need program are exempt from CON requirements if a notice of intent to build a facility at a specific location within a specific county was submitted to the Indiana State Department of Health after July 1, 1996 but before July 1, 1997.³³⁸ In addition, to receive exempt status, construction plans for the project are to have been approved by the Indiana State Department of Health and the Indiana Department of Fire and Building Safety before July 1, 1997, and the foundation for the project is to have been constructed in conformity with the aforesaid approved plans before July 1, 1997, as certified by an architect licensed under section 25-4 of the Indiana Code or a professional engineer licensed under section 25-31 of the Indiana Code.³³⁹

J. Home Health Agency Criminal Background Checks

Effective July 1, 1997, House Enrolled Act 1051³⁴⁰ requires that a home health agency³⁴¹ may not employ persons to work in a patient’s or client’s home for more than three business days unless the operator of the home health agency

- 330. 1997 Ind. Acts at 2413 (amending IND. CODE § 25-23.6-3-3).
- 331. 1997 Ind. Acts at 2458.
- 332. 1997 Ind. Acts 2391, 2391-2446.
- 333. *Id.*
- 334. Act of May 13, 1997, 1997 Ind. Acts 2088, 2088-2090 (effective July 1, 1997).
- 335. 1997 Ind. Acts at 2089.
- 336. *Id.* at 2089-90.
- 337. Hospitals are licensed by the ISDH. IND. CODE § 16-27-2.
- 338. 1997 Ind. Acts at 2090.
- 339. *Id.*
- 340. Act of May 12, 1997, 1997 Ind. Acts 2446, 2446-47 (effective July 1, 1997).
- 341. Home Health Agencies are regulated by the ISDH.

has first applied for a copy of the employee's limited criminal history.³⁴²

In addition, a home health agency is prohibited from employing a person a person for more than twenty-one calendar days unless the agency receives a copy of the person's limited criminal history except where the applicable state agency has failed to timely provide the agency with a limited criminal history.³⁴³

K. Foreign Domiciled Pharmacies

Effective July 1, 1997, House Enrolled Act 1087³⁴⁴ requires out-of-state pharmacies that dispense drugs or health care devices through the mail or other delivery methods to Indiana patients to register with the Indiana Board of Pharmacy.³⁴⁵

L. Prohibition On Sale of Fetal Tissue

Senate Enrolled Act 61³⁴⁶ provides that a person who intentionally acquires, receives, sells or transfers "fetal tissue"³⁴⁷ in exchange for an item of value commits a Class C felony. This Act was effective July 1, 1997.³⁴⁸

M. Treatment of Sex Crime Victims

Effective July 1, 1997, Senate Enrolled Act 144³⁴⁹ requires licensed medical service providers³⁵⁰ that provide emergency services to victims of sex crimes to do so without charge to the victim. Under certain circumstances, some reimbursement is available to providers for such services from a state agency.³⁵¹

V. TAX ISSUES

A. Judicial Developments

Both the courts and the Internal Revenue Service have provided needed clarification during the Survey period regarding the appropriate use of tax-exempt assets by exempt health care entities in furtherance of their exempt status.

During the survey period, the Indiana Tax Court further defined the requirements for nonprofit corporations to retain exemption from property taxation and state gross income and sales taxation. In *Sangralea Boys Fund, Inc.*

342. 1997 Ind. Acts at 2446 (amending IND. CODE § 16-27-2-4).

343. *Id.* at 2447 (amending IND. CODE § 16-27-2-5).

344. Act of May 13, 1997, 1997 Ind. Acts 2664, 2664-66 (effective July 1, 1997).

345. 1997 Ind. Acts at 2664 (adding IND. CODE § 25-26-17).

346. Act of May 13, 1997, 1997 Ind. Acts 2949, 2949-50 (effective July 1, 1997).

347. 1997 Ind. Acts at 2949 (amending IND. CODE § 35-46-5-1).

348. *Id.*

349. Act of April 28, 1997, 1997 Ind. Acts 1414, 1414-22 (effective July 1, 1997).

350. 1997 Ind. Acts at 1418-20 (amending IND. CODE § 5-2-6.1-39).

351. *Id.*

v. *State Board of Tax Commissioners*,³⁵² the court reversed the State Board's final determination denying Sangralea property tax exemption on the basis that the statute³⁵³ requires a complete unity of ownership, occupation, and use of property by the party seeking the exemption.³⁵⁴ Sangralea is a nonprofit corporation that was admitted to transact business in Indiana as a nonprofit corporation in 1963. Sangralea provides guidance and education for troubled youth in its facilities consistent with its organizational documents and with the requirements of the state to maintain exempt status. However, in 1987, Sangralea sought to carry out its activities by leasing a part of its property to three nonprofit entities. The rent-free leases required the lessee to engage in activities wholly consistent with Sangralea's operating purposes. Sangralea also continued to maintain oversight of the functions of the lessee.

The County Board of Review denied Sangralea a property tax exemption in 1992 and 1993. The State Board, upon appeal by Sangralea, denied the exemption for a majority of the property Sangralea owned excepting only the property occupied and used by Sangralea directly. Sangralea filed an original tax appeal and both parties filed motions for summary judgment. The court, in granting Sangralea's motion for summary judgment, held that an examination of the history of the Act showed that the legislature had until recent times, required that buildings be exempt from taxation if owned and *actually* occupied for charitable purposes.³⁵⁵ In 1975, the Act was recodified and the word "actually" was removed thus recognizing several judicial interpretations which focused on a liberal construction of the prior statute to accomplish overall charitable purposes.³⁵⁶

The court also indicated that its decision did not rest entirely on the 1975 statutory change given that prior judicial interpretation did not require strict adherence to the literal language but rather to the full intent of the statute. Further, the court found that other statutes affecting the Act supported its position that a lease of exempt property to an exempt lessee does not make the property taxable.³⁵⁷ The court concluded the relevant test is that a piece of property must be owned for charitable purposes, occupied for charitable purposes, and used for charitable purposes.³⁵⁸

In *Raintree Friends Housing, Inc. v. Indiana Department of State Revenue*,³⁵⁹ the tax court reversed the decision of the Department of State Revenue ("Departmental") denying the petitioners exemption from state gross income tax, sales tax and county food and beverage tax. The Department denied such exemptions after conducting an audit of two nonprofit housing corporations

352. 686 N.E.2d 954 (Ind. T.C. 1997).

353. IND. CODE § 6-1.1-10-16 (1993 & Supp. 1997).

354. *Sangralea*, 686 N.E.2d at 954.

355. *Id.* at 956.

356. *Id.* at 957.

357. *Id.* at 958.

358. *Id.*

359. 667 N.E.2d 810 (Ind. T.C. 1996).

which operated homes for aged citizens. The Department found that the homes were not operated exclusively for charitable purposes and did not qualify for exemption.³⁶⁰

While both housing corporations were organized as nonprofit corporations under Indiana law, the court did not find that determinative. Instead, applicants must show that they are charitable organizations specifically eligible for Indiana state tax exemption.³⁶¹ The court found that the term charitable had been broadly construed by Indiana courts and that public policy supports such a construction of the term.³⁶² The court further concluded that meeting the needs of the aged, while promoting decent housing, relief of loneliness, emotional stability, safety and related desirable goals confers a benefit upon society and accomplishes a charitable purpose.³⁶³

Although the services provided by petitioners were restricted to those beneficiaries paying fees, the court held that charitable organizations could limit services provided without impairing their exempt status.³⁶⁴ *Raintree*, in following a similar line of cases, reaffirms that exemption under Indiana law is based on broad principles and is not dependent solely on federal principles of exemption nor rigid state requirements.

B. Revised Model for Conflicts of Interest

The Internal Revenue Service ("IRS") has made public the latest revision of its Model Conflicts of Interest Policy applicable to exempt organizations.³⁶⁵ This recent version has several significant changes to that published in late 1996. By way of background, the IRS has suggested that tax exempt health care entities that have business relationships with members of their boards of directors risk violating the inurement prohibition and private benefit restrictions of section 501(c)(3) of the Internal Revenue Code.³⁶⁶

The IRS's current modifications of policy require that in addition to disclosing a financial interest in a matter, an interested person must provide all material facts and must leave the meeting while the determination of a conflict is discussed and decided.³⁶⁷ An interested person may make a presentation or provide information at a board or committee meeting, but upon the meeting's conclusion, the person must leave the meeting during the discussion and vote on any transaction that is the subject of the conflict of interest.³⁶⁸

The revised policy permits physicians who receive compensation from an

360. *Id.* at 812-13.

361. *Id.* at 813-14.

362. *Id.* at 814.

363. *Id.* at 814-15.

364. *Id.* at 816.

365. MODEL CONFLICTS OF INTEREST POLICY (IRS rev. version, May 22, 1997).

366. I.R.C. § 501(c)(3) (1994).

367. MODEL CONFLICTS OF INTEREST POLICY § 3-1(6) (IRS rev. version, May 22, 1997).

368. *Id.*

exempt entity to provide information to a board or committee setting compensation. However, such physicians are still precluded from service on any compensation committee based on the prior policy.³⁶⁹

C. Taxation of Exempt Organization Transaction

Among the more interesting provisions of the Taxpayer Relief Act of 1997 ("Act"),³⁷⁰ which became effective August 5, 1997, is a provision which broadens the scope of defined relationship between affiliated entities.

Generally, tax-exempt organizations do not pay unrelated business income ("UBI") tax on rents, interest or royalties received unless the source is a controlled affiliate, in which instance the revenue is partially taxable unless the affiliate is tax-exempt and has no revenue from an unrelated trade or business.³⁷¹

The Act defines "control" to bring more affiliates within the ambit of section 512(b)(13) of the Internal Revenue Code and to close possible loopholes when exempt organizations do not have complete ownership of an affiliate.³⁷² The IRS, prior to this change, required an exempt organization to own eighty percent or more of the affiliate before this section applied. The amendment now requires only fifty percent control and also expands certain attribution methodology, further extending the reach of the section.³⁷³ While the Act became effective August 5, 1997, payments pursuant to written agreements in effect on June 8, 1997, are permitted a two year transition period.³⁷⁴

D. Participation in a Provider-Sponsored Organization

The Balanced Budget Act of 1997 ("BBA")³⁷⁵ contains a section providing that a tax-exempt organization will not jeopardize its exemption solely because a hospital owned and operated by the organization participates in a provider-sponsored organization ("PSO").³⁷⁶

Further, the BBA authorizes PSOs as a type of managed care entity that may enter into contracts with the Medicare Program to provide services to its beneficiaries.³⁷⁷ The BBA defines a PSO as an entity established and operated by a health care provider or providers which directly or indirectly, through affiliated providers who are at financial risk, provides most of the health services required of Medicare enrollees.³⁷⁸

369. *Id.* § 5-1.

370. Pub. L. No. 105-34, 111 Stat. 788.

371. I.R.C. § 512(b) (1997).

372. 26 U.S.C. § 512(b)(13)(D) (Supp. 1998).

373. *Id.*

374. *Id.* § 512(b).

375. Pub. L. No. 105-33, 111 Stat. 251 (codified as amended in scattered titles and sections of U.S.C., predominantly 42 U.S.C. for the purposes herein).

376. I.R.C. § 501(o) (1994).

377. Pub. L. No. 105-33, 111 Stat. 251.

378. *Id.*

VI. LEGISLATION—FEDERAL: BALANCED BUDGET ACT OF 1997

On August 5, 1997, Congress passed the Balanced Budget Act of 1997,³⁷⁹ a comprehensive act that is expected to produce substantial savings in Medicare and Medicaid over the next five years.³⁸⁰ The comprehensiveness of the Act precludes a detailed discussion of all the provisions; therefore, this brief overview attempts to highlight only some of the provisions.³⁸¹

A. Medicare+Choice

Section 4001 of the BBA created a new Part C in Medicare³⁸² entitled the Medicare+Choice Program. Types of Medicare+Choice plans include: private fee for service plans, coordinated care plans (which includes health maintenance organizations, provider sponsored organizations (“PSOs”),³⁸³ religious fraternal benefit plans and other coordinated care plans that meet the Medicare+Choice standards), and medical savings accounts (“MSAs”).³⁸⁴

All Medicare beneficiaries will be eligible for the Medicare+Choice plan except those with end-stage renal disease who are not already enrolled at the time of diagnosis.³⁸⁵ Eligible beneficiaries may enroll in or disenroll from the new plans on a monthly basis from 1998 through 2001.³⁸⁶ The Medicare+Choice plans are required to provide the current Medicare benefit package, with the exception of hospice services.³⁸⁷ In addition, the plans must provide access to emergency services and must maintain meaningful procedures for hearing and

379. *Id.*

380. Donna Clark et al., *Providers Face Multitude of Payment Reductions*, HEALTH L. DIG., Nov. 1997, at 3. Projected savings include \$115 billion for Medicare and \$13 billion for Medicaid. *Id.*

381. See *id.*; BALANCED BUDGET ACT OF 1997, MEDICARE AND MEDICAID PROVISIONS GOVERNMENT PRINTING OFFICE (for a more comprehensive overview of the Act).

382. Before the BBA was enacted, Medicare consisted of Part A, inpatient facility services, and Part B, physician services.

383. PSOs are defined as public or private entities established by or organized by health care providers or a group of affiliated providers that provide a substantial portion of health care items and services directly through providers or affiliated groups of providers. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (to be codified at 42 U.S.C. § 1395w-25) [hereinafter Budget Act].

384. An MSA is a pilot project covering 390,000 beneficiaries who will take out a high-deductible catastrophic policy and get Medicare contributions to their own tax-free account to help pay smaller medical expenses. See NHLA HEALTH LAW. NEWS, Sept. 1997.

385. See Budget Act, *supra* note 380, § 1395w-21.

386. *Id.* For the first six months of 2002, beneficiaries may enroll or disenroll from the plans, but may only change plans one time during this six-month period. After 2002, the same process applies, except the six-month time frame becomes a three-month time frame.

387. *Id.* § 1395w-23.

resolving beneficiary grievances.³⁸⁸ Standards that Medicare+Choice organizations must meet in order to contract to enroll Medicare beneficiaries are scheduled to be published June 1, 1998. The BBA also provides for the development of solvency standards for PSOs.³⁸⁹

B. Medical Savings Accounts

Section 4006 of the BBA sets out guidance concerning medical savings accounts ("MSAs").³⁹⁰ Pursuant to the Act, Medicare's contributions to a Medicare+Choice MSA account and the interest income earned on amounts in the account are not included in the gross income of the MSA holder.³⁹¹ However, only the Secretary can make direct contributions to the MSA account.³⁹² Withdrawals that a beneficiary makes for qualified medical expenses are not included in the taxable income of the beneficiary yet withdrawals for non-medical expenses are included in taxable income and are subject to a penalty if the medical savings account funds are used for non-medical expenses and a minimum balance is not maintained.³⁹³ Upon the death of the MSA holder, the surviving spouse may continue the MSA but no new contributions can be made.³⁹⁴ In addition, withdrawals for non-medical expenses are taxable and are subject to a fifteen percent excise tax unless the withdrawal is made after the surviving spouse reaches age sixty-five or becomes disabled.³⁹⁵

C. Anti-Fraud and Abuse Provisions and Improvements in Protecting Program Integrity

The BBA includes several new provisions to help curb fraud and abuse in health care. The Secretary of the Department of Health and Human Services, Donna E. Shalala, in a statement given on the day the BBA was enacted, stated that "[p]erhaps most importantly, the BBA includes many of the tools that the President repeatedly requested to continue our fight to eliminate waste, fraud and abuse in health care."³⁹⁶

To help curb fraud and abuse, the BBA provides for permanent exclusion from Medicare or any state-related health care program for any person or entity who has been convicted on two or more previous occasions of one or more health-related crimes for which mandatory exclusion could be imposed.³⁹⁷ In

388. *Id.* § 1395w-22.

389. *Id.* § 1395w-26. The minimum enrollment requirements can be waived the first three contract years. *Id.*

390. See generally 26 U.S.C.A. § 138 (Supp. 1998).

391. *Id.* § 138(a).

392. *Id.* § 138(b).

393. *Id.* § 138(c).

394. *Id.* § 138(d).

395. *Id.* § 220(f).

396. Donna E. Shalala, Statement, NHLA HEALTH LAWYERS NEWS, Sept. 1997.

397. 42 U.S.C.A. § 1320a-7 (Supp. 1998). These crimes include Medicare and state health

addition, the Secretary may exclude an individual or entity from participation in any federal health care program for numerous other violations.³⁹⁸ If the first violation occurred on or after August 5, 1997, the individual will be excluded from participation in Medicare or any state-related health care program for at least ten years.³⁹⁹ After the second violation, the period of exclusion will be permanent.⁴⁰⁰ In addition, the Secretary may refuse to enter into or renew an agreement with a provider if the provider has been convicted of a felony under federal or state law for an offense which the Secretary determines is inconsistent with the best interests of the program or program beneficiaries.⁴⁰¹

Other anti-fraud provisions authorize the Secretary to exclude from Medicare or any state health care program an entity controlled by a family member of a sanctioned individual.⁴⁰² In addition, civil monetary penalties of up to \$10,000 could be assessed against a person when the individual arranges or contracts with an individual or entity for the provision of items or services when it knows or should know that the individual or entity has been excluded from a federal health care program.⁴⁰³ A civil monetary penalty of up to \$50,000 plus up to three times the amount of the remuneration offered, paid, solicited or received could be levied for each violation of the anti-kickback provisions of Title XI of the Social Security Act.⁴⁰⁴

To assist providers in determining whether certain activities constitute self-referral, the BBA provides that the Secretary must issue binding advisory opinions as to whether a physician referral for certain designated health services (other than clinical laboratory services) is prohibited by law.⁴⁰⁵ Each advisory opinion is binding on the Department of Health and Human Services Secretary

care program-related crimes, patient abuse or felonies related to health care fraud or controlled substances. *Id.*

398. These violations include: convictions relating to fraud, obstruction of an investigation, misdemeanor convictions relating to controlled substances, license revocation or suspension, exclusion or suspension under federal or state health care program, claims for excessive charges or unnecessary services and failure of certain organizations to furnish medically necessary services, fraud, kickbacks and other prohibited activities, entities controlled by a sanctioned individual, failure to disclose required information, failure to supply requested information on subcontractors and suppliers, failure to supply payment information, failure to grant immediate access, failure to take corrective action, default on health education loan or scholarship obligations, and, finally, controlling a sanctioned entity. *Id.* § 1320a-7b.

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.* § 1320a-7b(8).

403. See Budget Act, *supra* note 380, § 1395w-27.

404. *Id.* The anti-kickback statute is a criminal law, the general premise of which is that it is a felony to offer, pay, solicit or receive remuneration in order to induce referrals or otherwise generate business that may be paid by Medicare, Medicaid or other governmental health care programs. 42 U.S.C.A. § 1320a-7(b) (Supp. 1998).

405. *Id.* § 1320a-7(d).

and the party or parties requesting the opinion.⁴⁰⁶

In addition, section 4707 of the BBA includes provisions relating to fraud and abuse in managed care.⁴⁰⁷ This section prohibits a managed care entity from knowingly having a director, officer, partner, or person with more than five percent of the entity's equity, or having an employment, consulting, or other agreement with such a person for the provision of items and services that are significant and material to the entity's contractual obligation with the state who has been disbarred or suspended by the federal government.⁴⁰⁸ The section also restricts a managed care organization from distributing marketing materials that contain certain false or misleading information.⁴⁰⁹ Furthermore, the advertising materials must market to the entire service area and no tie-ins with other insurance products are permitted.⁴¹⁰ The state must also have conflict-of-interest safeguards for officers and employees of the state with responsibilities relating to contracts with such organizations or to the default enrollment process that are at least as effective as the federal safeguards provided under section 27 of the Office of the Federal Procurement Policy Act that apply to procurement officials with comparable responsibilities.⁴¹¹

Section 1932(e) requires that states establish intermediate sanctions, which may include civil money penalties or other remedies if an organization fails substantially to provide medically necessary items and services that are required under law or under contract, by imposing excess premiums and charges, discriminating among enrollees, misrepresenting or falsifying information, or violating marketing guidelines.⁴¹²

D. Provisions Relating to Provider Payments

Numerous provisions in the BBA reduced payments to providers. Key reductions in the BBA include payment cuts for prospective payment system ("PPS") hospitals,⁴¹³ PPS-exempt hospitals subject to the Tax Equity and Fiscal Responsibility Act of 1982⁴¹⁴ and teaching hospitals, the transfer of most home health care spending to Medicare Part B, and the mandating of PPS for skilled nursing facilities, home health, rehabilitation and hospital outpatient services.⁴¹⁵ Beginning in fiscal year 1998, disproportionate share payments ("DSH")

406. *Id.*

407. See Budget Act, *supra* note 380, § 1396u-(2).

408. See *id.* § 1396-2(d).

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* § 1396u-(2)(e).

413. A PPS hospital is one that is paid on a per-case reimbursement scheme in which cases are divided into categories for which the price is set in advance.

414. Pub. L. No. 97-248, 96 Stat. 324.

415. See Clark et al., *supra* note 377 (for a more complete description and analysis of the provisions regarding payment reductions in the Balanced Budget Act).

otherwise payable will be reduced by one percent a year continuing through 2001.⁴¹⁶ Within one year, the Secretary must submit a report to the House Ways and Means Committee and the Senate Finance Committee, with recommendations for a new formula for determining DSH payments for hospitals.⁴¹⁷

Section 4413 of the BBA allows psychiatric, rehabilitation, children's cancer, and long-term care hospitals and psychiatric and rehabilitation units the opportunity to request a rebased TEFRA target amount.⁴¹⁸ To qualify for a rebased target amount, a hospital or unit must have received Medicare payments for services furnished during cost reporting periods beginning before October 1, 1990.⁴¹⁹ The rebasing will be determined by using the five latest settled cost reports as of August 5, 1997, updated for inflation, excluding the highest and lowest cost reporting periods and calculating an average for the remaining three reporting periods.⁴²⁰ A hospital or unit must affirmatively request rebasing.⁴²¹ Providers will be able to request rebasing only for fiscal year 1998. A provider that fails to timely request rebasing for 1998 will not have another chance.⁴²²

Section 4421 of the Act requires the Secretary to establish a prospective payment system ("PPS") for inpatient rehabilitation hospital or unit services (operating and capital costs) based on case mix group.⁴²³ A PPS will be phased in over two transition years.⁴²⁴ The Secretary will have much discretion in creating the PPS system for rehabilitation services, including the unit of payment.

Skilled nursing facilities ("SNFs") will also see payment methodology changes stemming from the BBA. The SNF cost limits for cost reporting periods beginning on or after October 1, 1997, will be based on the limits effective for the cost reporting period beginning on or after October 1, 1996.⁴²⁵ In addition, effective for cost reporting periods on or after July 1, 1998, there will be prospective payment for SNF services on a per diem basis.⁴²⁶ The new law calls for "bundling" of all SNF services, similar to the current practice for hospital patients.⁴²⁷

416. See generally Budget Act, *supra* note 380, § 1395ww.

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. Dennis Barr, *Final Rule Implements Many Hospital Payment Provisions of Balanced Budget Act*, REIMBURSEMENT ADVISOR, Oct. 1997.

423. See Budget Act, *supra* note 380, § 1395ww.

424. *Id.* In the first year, the payment rate will be based two-thirds on the TEFRA methodology and one-third on the PPS methodology. In the second transition year the payment rate will be based one-third on the TEFRA methodology and two-thirds on the PPS methodology. For the third and subsequent years, payment will be based entirely on the PPS methodology. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

The BBA also removes the restriction on settings for services furnished by nurse practitioners and clinical nurse specialists,⁴²⁸ which currently is limited to services provided in rural areas or in skilled nursing facilities.⁴²⁹ Beginning in 1998, nurse practitioner services in any setting will be reimbursed equal to eighty percent of the lesser of the actual charge or eighty-five percent of the physician fee schedule.⁴³⁰ However, reimbursement of nurse practitioner and physician assistant services under the BBA is contingent upon the absence of a facility charge associated with such services.⁴³¹

Section 4523 of the Act mandates implementation of a prospective payment system for hospital outpatient department services beginning January 1, 1999.⁴³² Cancer hospitals, however, will not be subject to the prospective payment system until January 1, 2000.⁴³³ The Secretary has been given great discretionary latitude over the details of the new payment methodology which is especially important as there will be no administrative or judicial review of the development of the classification system, including the establishment of groups and relative payment weights, wage adjustment factors, other adjustments, volume performance methodologies, the calculation of base amounts, periodic adjustments, and the establishment of a separate conversion factor for cancer hospitals.⁴³⁴ The goal of the BBA is to gradually reduce the current patient copayment based on individual hospital charges to one based on twenty percent of the outpatient department fee schedule.⁴³⁵

Effective January 1, 1998, payment for outpatient therapy services and comprehensive outpatient rehabilitation services will consist of the lower of charges or the reasonable costs, reduced by ten percent, minus beneficiary coinsurance payments (which is based on twenty percent of charges).⁴³⁶ Therapy services furnished by hospitals will continue to be paid under the rules established for payment of outpatient department services in 1998.⁴³⁷ For rehabilitation agencies and certain outpatient therapy providers other than outpatient hospital departments, the BBA also includes the application of a fee schedule provision for therapy services beginning January 1, 1999 and per beneficiary therapy caps of \$1,500.00.⁴³⁸

428. The definition of a clinical nurse specialist is also clarified to include only a registered nurse licensed to practice in the state who holds a Master's degree in a defined clinical area of nursing and from an accredited educational institution. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* § 1395l(g)(1).

E. Home Health Agencies

Numerous provisions in the BBA concerned home health agencies. The BBA requires that hospital discharge planning evaluations include the availability of home health services in the area, yet the hospital may not limit the qualified providers of home health services and must disclose financial relationships with the home health service entities.⁴³⁹ In addition, hospitals with a financial relationship with a home health agency would be required to report to the Secretary the nature of the financial interest, the number of individuals discharged from the hospital requiring home health services, and the percentage of those individuals receiving services from the home health agency.⁴⁴⁰

Home health reimbursement also saw changes with the enactment of the BBA. The BBA requires the Secretary to develop and implement a prospective payment system for all home health services effective for cost reporting periods beginning on or after October 1, 1999.⁴⁴¹ Once the PPS has been implemented, a home health agency will be required to submit claims for all services (including contracted services) furnished to an individual under a plan of care of that agency.⁴⁴² As an added security measure, the BBA prohibits Federal Medicaid matching funds for home health services unless the home health agency or organization provides the state Medicaid agency a surety bond in a form specified by the Secretary for Medicare home health providers. The amount of the surety bond must be no less than \$50,000 or an amount comparable to that specified by the Secretary for Medicare.⁴⁴³

F. Increased Beneficiary Protections

The BBA added numerous protections for beneficiaries of managed care including assuring coverage of emergency services.⁴⁴⁴ Utilizing the "prudent lay person" standard, each contract with a managed care entity must require coverage of emergency services without regard to prior authorization and must comply with Medicare guidelines for post-stabilization care.⁴⁴⁵ Furthermore, a managed care organization must not prohibit or restrict a health care professional from advising a beneficiary about his or her health status, medical care or treatment, regardless of whether benefits for the care are provided under the contract if the health care professional is acting within the lawful scope of practice.⁴⁴⁶ Each

439. See Budget Act, *supra* note 380, § 4321.

440. *Id.*

441. See Budget Act, *supra* note 380, § 1395fff.

442. *Id.*

443. *Id.*

444. See generally *id.* 1395w-22.

445. *Id.*

446. *Id.* This provision does not require a managed care organization to provide coverage of a counseling or referral service if it objects to the service on moral or religious grounds and makes available information on its policies available to prospective enrollees and to enrollees within 90 days after the date the organization adopts a change in policy regarding such a counseling

managed care organization must also establish an internal grievance procedure under which an enrollee may challenge the denial or coverage of, or payment for, such assistance⁴⁴⁷ and the organization must provide the Secretary and the State with adequate assurances that the organization has the capacity to serve the expected enrollment in the service area.⁴⁴⁸

Other beneficiary protections include not holding enrollees liable for payments to providers or entitlements that are not made by the state in the event of entity insolvency⁴⁴⁹ and prohibiting a managed care organization from discriminating with respect to participation, reimbursement, or indemnification for any provider acting within the scope of that provider's license or certification under applicable state law, solely on the basis of such license or certification.⁴⁵⁰

G. State Children's Health Insurance Program

The BBA amends the Social Security Act to add a new title, Title XXI, the State Children's Health Insurance Program.⁴⁵¹ The purpose of the children's program is to enable states to initiate and expand the provision of child health assistance to uninsured, low-income children.⁴⁵² The BBA authorizes providing states with \$24 billion through 2002 to expand coverage for children.⁴⁵³ Under the BBA, states may expand Medicaid or receive the funds in a grant or both. Under the grant approach, states would have to provide coverage equivalent to one of three benchmark packages: the standard Blue Cross/Blue Shield Preferred Provider Option offered under the Federal Employees Health Benefits Program, a health benefits plan that is generally available to state employees, and is the HMO with the largest commercial enrollment in the state.⁴⁵⁴ The coverage of the plan must include basic services⁴⁵⁵ and must have an aggregate actuarial value that is at least equivalent to one of the benchmark packages.⁴⁵⁶ No more than ten percent of a state's payments may be used for the total costs of other child health assistance for targeted low-income children, health services initiatives, outreach, and administrative costs.⁴⁵⁷

or referral service. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. See generally *id.* § 1397aa.

452. *Id.*

453. *Id.*

454. *Id.* § 1397cc.

455. *Id.* These services include inpatient and outpatient hospital services, physicians' surgical and medical services, laboratory and X-ray services, and well-baby and well-child care, including age-appropriate immunizations. *Id.*

456. *Id.*

457. *Id.* § 1397ee.

INDIANA APPELLATE PROCEDURE IN 1997

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INTRODUCTION

During the survey period¹ there were no landmark judicial decisions applicable to appellate procedure. However, there were important cases which addressed appellate procedures and, in some cases, changed appellate procedures. Those cases are addressed in Part I of this Article. During the survey period there were also some changes to the Indiana Rules of Appellate Procedure,² effective January 1, 1998. Those changes are addressed in Part II of this Article.³

I. CASES ADDRESSING APPELLATE PROCEDURE

A. The Appellate Rules

1. Appellate Rule 2(A) and Indiana Trial Rules 23(B) and 59(C).—The issue of what constitutes an “appealable final order” within the meaning of Appellate Rule 2(A) and Indiana Trial Rule 59(C) remains unsettled with respect to class action certification orders.⁴ At issue is the scope of the Indiana Supreme Court’s ruling in *Berry v. Huffman*,⁵ which seemingly rejected the “definite and distinct branch” doctrine, which previously governed the issue of whether a ruling constitutes an “appealable final order.”⁶ It is necessary to briefly discuss *Berry* in order to put the issue into context.

The issue in *Berry* was whether a summary judgment ruling on less than all of the issues, which did not expressly state that “there [was] no just reason for delay and expressly direct[ed] entry of judgment,”⁷ was an “appealable final order.” A determination of that issue rested on whether the supreme court would continue to recognize the “doctrine of finality employed prior to the adoption of

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1. October 1, 1996 to September 30, 1997.
2. Hereinafter “Appellate Rule(s).”
3. In James J. Ammeen, Jr., *Developments in Appellate Practice in 1996*, 30 IND. L. REV. 1165 (1997), a thorough analysis of the standards of review employed by appellate courts is found. *See id.* at 1178-1181. No significant changes to those standards occurred during the survey period. As a result, those standards will not be addressed in this Article.
4. The procedures for class certifications are found in Indiana Trial Rule 23.
5. 643 N.E.2d 327 (Ind. 1994).
6. *Id.* at 329.
7. *Id.*

the Indiana Rules of Trial Procedure in 1970,⁸ pursuant to which “a judgment was final and appealable even if it did not dispose of all the issues as to all the parties, so long as it disposed of ‘a distinct and definite branch of the litigation.’”⁹ Because that “scheme . . . often left litigants uncertain whether to pursue an appeal that might be dismissed as premature or risk losing their right of appeal altogether,”¹⁰ Indiana adopted “Trial Rules 54(B) and 56(C) in an effort to provide greater certainty to the parties and to strike an appropriate balance between the interest in the speedy review of certain judgments and the inefficiencies of piecemeal appeals.”¹¹

Trial Rules 54(B) and 56(C) work as follows:

Trial Rule 54(B) defines the procedure for entering a final judgment as to less than all of the issues, claims, or parties in an action. According to this rule, a judgment as to less than all of the parties is final only when the court in writing expressly determines that there is no just reason for delay and expressly directs entry of judgment. The rule explicitly states that, absent certification, the judgment “shall not terminate the action as to any of the claims or parties” and “is not final.” Similarly, T.R. 56(C) states that partial summary judgments are interlocutory unless the trial judge expressly determines in writing that there is not just reason for delay and expressly directs entry of judgment as to less than all the issues, claims, or parties.¹²

Rejecting the argument that “the distinct and definite branch doctrine of finality survived the adoption of the Trial Rules,” the supreme court held “that the certification requirements of Trial Rules 54(B) and 56(C) supercede the distinct and definite branch doctrine.”¹³

Judgments or orders as to less than all of the issues, claims, or parties remain interlocutory until expressly certified as final by the trial judge. To the extent that *Richards [v. Crown Point Community School Corp.]*¹⁴ and other cases support the distinct and definite branch doctrine,

8. *Id.* at 328.

9. *Id.* “In multiparty litigation, this meant that an order finally determining all of the issues and claims raised by one of the parties was final. If that party failed to perfect a timely appeal from that judgment, he lost his right to appeal.” *Id.*

10. *Id.* at 328-29.

11. *Id.* at 329.

12. *Id.*

13. *Id.*

14. 269 N.E.2d 5 (Ind. 1971) (holding that a partial summary judgment settling a distinct and definite branch of the litigation was final and could be appealed if the party filed a motion to correct errors). The supreme court in *Berry* observed that “[w]hile the parties to that appeal did not raise the applicability of the new Trial Rules, effective only four months when that appeal was docketed, there was at least an implication that ‘distinct and definite’ might still be viable.” *Berry*, 643 N.E.2d at 329.

they are overruled. Were we to hold otherwise, litigants would again be left to guess whether or not a given order was appealable. This is precisely the situation that T.R. 54(B) and 56(C) were drafted and adopted to prevent.¹⁵

The holding in *Berry* seems clear.¹⁶ However, when applied in the class action certification context, that seeming clarity has been clouded. In *Martin v. Amoco Oil Co.*,¹⁷ the court of appeals discussed¹⁸ the issue of whether a class certification order is a “final appealable order” even if it does not contain the “magic language”—i.e., an express determination that there “is no just reason for delay” accompanied by an express direction of entry of judgment—from Trial Rule 54(B).¹⁹ Cases prior to *Berry* followed the decision in *Gulf Oil Corp. v. McManus*,²⁰ which held that “class certification orders were final and appealable because they disposed of a distinct and definite branch of the litigation.”²¹ The court in *Martin* wrote that “[t]hough we agree with the reasoning in *Gulf Oil* that class certification hearings and orders are the only ‘trial’ to be had on the issue of class certification and therefore should be final and appealable, we are constrained by *Berry* from simply so holding.”²²

Subsequent to Judge Garrard’s opinion in *Martin*, Judge Najam relied on *Martin* to “treat [a] class certification order as a final, appealable order.”²³ The court in *Connerwood Healthcare, Inc. v. Estate of Herron*²⁴ cited *Martin* for the proposition that resolution of the issue of whether class certification orders are “final appealable orders” is “uncertain after the supreme court’s decision in *Berry v. Huffman*”²⁵ Nonetheless, the court stated that it “agree[d with *Martin*] that class certification orders are final and appealable”²⁶ The court in *Connerwood Healthcare* failed to recognize that the court in *Martin*, despite

15. *Berry*, 643 N.E.2d at 329.

16. See, e.g., *Hanson v. Spolnik*, 685 N.E.2d 71, 81 (Ind. Ct. App. 1997) (“our supreme court recently clarified when an order becomes final and appealable in *Berry v. Huffman*” (citation omitted)).

17. 679 N.E.2d 139 (Ind. Ct. App. 1997).

18. The court did not decide the issue, choosing instead to reach a decision on other grounds. *Id.* at 144 (“We decline to ground our holding on the sole premise that class certification orders are final and appealable interlocutory orders, because it is not clear after our supreme court’s decision in *Berry v. Huffman*, 643 N.E.2d 327 (Ind. 1994) whether class certification orders are final and appealable orders at the present time.”).

19. See *Berry*, 643 N.E.2d at 328-29.

20. 363 N.E.2d 223 (Ind. App. 1977).

21. *Martin*, 679 N.E.2d at 144.

22. *Id.*

23. *Connerwood Healthcare, Inc. v. Estate of Herron*, 683 N.E.2d 1322, 1325 n.2 (Ind. Ct. App. 1997).

24. *Id.*

25. *Id.*

26. *Id.*

questioning the decision in *Berry*, nonetheless recognized that it was “constrained by *Berry*” from ruling as the court did in *Connerwood Healthcare*.²⁷ By failing to exercise the same restraint as the court in *Martin*, the court in *Connerwood Healthcare* took *Martin* one step further by expressly stating that a class action certification order is a “final appealable order.”²⁸

The holding in *Berry* is written in clear and concise language: “We hold today that the certification requirements of Trial Rules 54(B) and 56(C) *supercede the distinct and definite branch doctrine*.²⁹ The court expressly overruled other cases that recognized the “distinct and definite branch doctrine.”³⁰ Because the *Gulf Oil* decision, upon which the court in *Martin* rested its criticism of the *Berry* decision (and subsequently the court in *Connerwood Healthcare*), was based on the “distinct and definite branch doctrine,” it seems clear that *Berry* overrules the reasoning of the *Gulf Oil* decision. Indeed, the court in *Martin* recognized as much.³¹

Based on the above, it is predicted that when the supreme court considers the issue of whether a class action certification order is a final appealable order, it will decide that unless the “magic language” of Trial Rule 54(B) is included in the order, then the order is not automatically considered a “final appealable order” within the meaning of Appellate Rule 2(A) and Indiana Trial Rule 59(C). Such a result is consistent with the predictability that was at the core of the *Berry* decision,³² and which is now lost because of the *Connerwood Healthcare* opinion. In the meantime, practitioners are urged to treat a class action certification order as an “appealable final order,” and make the decision of whether, and when, to pursue an appeal accordingly. It is better to appeal and learn that the appeal is premature, than to not treat the order as a “final appealable order” and risk losing the right to appeal at a later time. Of course, the uncertainty can be avoided by ensuring that the “magic language” of Trial Rule 54(B) is included in any class certification order.

2. *Appellate Rule 2(A) and Indiana Trial Rule 53.3.*—In *Marshall v. K & W Products*,³³ the court considered the issue of timely appeals when an appellant files a motion to correct errors. In *Marshall*, the plaintiff in a small claims action prevailed. Judgment was entered on August 28, 1995, in an amount of \$6.25,

27. In *Connerwood Healthcare*, the court noted that the appellee did not “challenge the propriety of [the court’s] review where . . . [the court] treat[ed] the class certification as a final, appealable order.” *Id.*

28. *Connerwood Healthcare*, 683 N.E.2d at 1325 n.2; *see also* *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 980 (Ind. Ct. App. 1996) (stating, without discussing the *Berry* decision, that “[a] class certification order is a final, appealable order.”).

29. *Berry*, 643 N.E.2d at 329 (emphasis added).

30. *Id.*

31. *Martin*, 679 N.E.2d at 144.

32. *See Berry*, 643 N.E.2d at 329 (“Were we to hold otherwise, litigants would again be left to guess whether or not a given order was appealable. This is precisely the situation that T.R. 54(B) and 56(C) were drafted and adopted to prevent.”).

33. 683 N.E.2d 1359 (Ind. Ct. App. 1997).

significantly less than the amount sought in his complaint.³⁴ The plaintiff filed a motion to correct errors on September 27, 1995. On October 11, 1995, a hearing on the motion was set for November 21, 1995, which was continued to December 15, 1995, at which time the court took the motion under advisement. On March 27, 1996, the court denied the plaintiff's motion. On April 19, 1996, the plaintiff filed his *praecipe*.

The main issue presented in *Marshall* was whether the failure of an appellant to personally serve the trial judge with a motion to correct errors, as mandated by Indiana Trial Rule 59(C), serves as an excuse³⁵ to the self-executing thirty-day time limitation to rule on a motion to correct errors³⁶ when the trial judge, despite not being personally served with a copy of the motion, has actual knowledge of its existence.³⁷

The court in *Marshall* first set forth a concise statement of the law interpreting the procedural interplay between Appellate Rule 2(A) and Indiana Trial Rule 53.3(A):

Indiana Appellate Rule 2(A) requires that every party seeking an appeal must first file a praecipe within thirty days of the entry of final judgment. When a party opts to file a motion to correct error, however, the praecipe must be filed within thirty days from either the date the trial court rules

34. The plaintiff, whose automobile transmission burned out because of a leak, sued the manufacturer of a product which promised to stop transmission leaks. The plaintiff sued under a breach of warranty theory, and sought damages for the expenses of repairing the car's transmission, towing, overnight accommodations caused by the fact that his car broke down out of state, and loss of use of his automobile. The small claims court entered judgment in favor of the plaintiff, but awarded him a refund in the amount of the cost of a can of the defendant's product, plus interest on that amount from the date of purchase. *Id.* at 1360.

35. Indiana Trial Rule 53.3(B)(1) states: "The time limitation for ruling on a motion to correct error established under Section (A) of this rule shall not apply where: (1) the party has failed to serve the judge personally. . . ."

36. Indiana Trial Rule 53.3(A) states:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the praecipe under Appellate Rule 2(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

37. The court also addressed the issue of whether "[j]udgments in small claims actions are 'subject to review as prescribed by relevant Indiana rules and statutes.'" *Id.* at 1360 (quoting IND. SMALL CLAIMS R. 11(A)). In particular, the issue in *Marshall* was whether the same procedures apply to motions to correct errors filed in small claims courts as in Indiana trial courts. The court in *Marshall* held that those procedures do apply, noting "[o]ur supreme court has held that 'the Rules of Trial Procedure apply in small claims court unless the particular rule in question is inconsistent with something in the small claims rules.'" *Id.* at 1361 (quoting *Bowman v. Kitchel*, 644 N.E.2d 878, 879 (Ind. 1995)).

on the motion to correct error or the date the motion is deemed denied. Failure to file the praecipe in a timely manner is a jurisdictional failure requiring dismissal of the appeal. Additionally, [Indiana Trial Rule 53.3(A)] limits the time available for a trial court to rule on a motion to correct error. If the trial court “fails to rule on a Motion to Correct Error within thirty (30) days after it was heard,” the motion “shall be deemed denied.” This rule is self-activating upon the passage of the requisite number of days.³⁸

The court then noted what the record did not indicate that the plaintiff had personally served the trial judge with a copy of his motion to correct errors, as required by Indiana Trial Rule 59(C).³⁹ Thus, on its face, it would seem that the Indiana Trial Rule 53.3(B)(1) exception to the time limits set forth in Indiana Trial Rule 53.3(A)⁴⁰ would excuse the plaintiff’s tardiness. However, the court went beyond the text of Indiana Trial Rule 53.3(B)(1) and considered its purpose, which is to ensure that a trial judge has actual knowledge of a motion to correct errors before the self-executing time requirements of Indiana Trial Rule 53.3(A) are triggered.⁴¹ The court in *Marshall* concluded that:

the exception for personal service of the judge only applies where the judge has no actual knowledge of the motion to correct error, such as where the motion would be deemed denied after 45 days for failure to set the motion for hearing. Where, as here, a hearing was held and the judge plainly had actual knowledge of the motion, the exception for personal service serves no purpose. We hold that the exception found in [Indiana Trial Rule 53.3(B)(1)] does not apply to [Indiana Trial Rule 53.3(A)] where the judge has actual knowledge of the motion to correct errors.⁴²

The court then dismissed the appellant’s appeal because “his praecipe was not timely filed and as a result, [the court of appeals] lack[ed] jurisdiction . . .”⁴³ Clearly, based on *Marshall*, an appellate court will not allow a practitioner to use a technical reading of Indiana Trial Rule 53.3(B)(1) as an excuse for failing to

38. *Id.* at 1361 (citations omitted).

39. *Id.*

40. See *supra* notes 6-7.

41. *Marshall*, 683 N.E.2d at 1361.

42. *Id.*

43. *Id.* The court explained:

Here, the trial court held a hearing on Marshall’s motion to correct error on December 15, 1995. Thus, the trial court had until January 16, 1996 to rule on the motion. [January 14, 1996 fell on a Sunday, and the following day was a legal holiday]. Marshall’s motion was therefore deemed denied on January 16, 1996 and Marshall was required to file his praecipe by February 15, 1996. Because Marshall did not file his praecipe until April 19, 1996, his praecipe was not timely filed and as a result, we lack jurisdiction and must dismiss the appeal.

timely file a *praecipe* pursuant to Appellate Rule 2(A). If the record reveals that the trial judge had actual knowledge of the motion, an appellate court will not apply Indiana Trial Rule 53.3(B)(1) literally in order to vest itself with jurisdiction.

3. *Appellate Rule 2(A) and Indiana Trial Rule 72(E).*—During the survey period there were two cases in which the interplay between Indiana Trial Rule 72(E)⁴⁴ and Appellate Rule 2(A) was addressed. In *Vaughn v. Schnitz*,⁴⁵ the trial court entered judgment against the defendant on April 3, 1995; the defendant filed a motion to correct errors on May 3, 1995; a hearing was set on that motion for July 24, 1995; and the defendant's motion was denied on July 31, 1995. Notice of the court's order was sent to plaintiff's counsel and to the defendant, but not to the defendant's counsel. The defendant never told his attorney about the ruling. The defendant's attorney waited until September 15, 1995 to check the court records, despite the fact that, pursuant to Indiana Trial Rule 53.3, the motion would have been deemed automatically denied on August 30, 1995. On October 6, 1995, defendant's counsel, relying on Indiana Trial Rule 72(E), filed a motion for an extension of time within which to file a *praecipe*. The trial court denied that motion and the defendant appealed, arguing that the trial court abused its discretion by so ruling because the defendant's attorney was without notice of the court's order denying the motion to correct errors.

The appeals court rejected the appellant's argument:

[Appellant's] argument suffers from a fundamental error; the trial court does not have the authority to grant an extension of time within which to file a *praecipe*. [T]he timely filing of a *praecipe* is a jurisdictional prerequisite to an appeal and a precondition to the right to an appeal. [P]erfecting an appeal in a timely manner is a jurisdictional matter. . . . Thus, once the thirty day time limit of Appellate Rule 2 has expired, this court is without jurisdiction to hear the appeal and we must dismiss. To permit a trial court to grant an extension of time within which to file a *praecipe* would allow the trial court to revive this court's jurisdiction contrary to supreme court procedural rules. This a trial court cannot do. Accordingly, the trial court did not abuse its discretion when it denied

44. Indiana Trial Rule 72(E) states:

Lack of notice, or the lack of the actual receipt of a copy of the entry from the Clerk shall not affect the time within which to contest the ruling, order or judgment, or authorize the Court to relieve a party of the failure to initiate proceedings to contest such ruling, order or judgment, except as provided in this section. When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the Chronological Case Summary, the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge or who relied upon incorrect representations by Court personnel. Such extension shall commence when the party first obtained actual knowledge and not exceed the original time limitation.

45. 673 N.E.2d 501 (Ind. Ct. App. 1996).

[appellant's] 72(E) motion.⁴⁶

The court went on to state:

However, this court, under its inherent power, has the authority to entertain an appeal after the time permitted has expired. This court will exercise its inherent power and grant equitable relief only in rare and exceptional cases, such as in matters of great public interest, or where extraordinary circumstances exist. Generic grounds such as lack of prejudice to the opposing party or lack of disadvantage to the reviewing court are insufficient to invoke this equitable relief.⁴⁷

The court refused to exercise that inherent power, holding that the facts in *Vaughn* were "not the type of extraordinary circumstances warranting equitable relief. Equity aids the vigilant, not those who sleep on their rights."⁴⁸

The clear teaching of *Vaughn* is that an attorney has a proactive duty to check with the trial court to determine whether a ruling has been made on a motion to correct errors; the consequences for failing to timely do so cannot be alleviated by a motion for extension of time filed pursuant to Indiana Trial Rule 72(E). A trial court cannot expand the subject matter jurisdiction of Indiana's appellate courts.

In *Gable v. Curtis*,⁴⁹ the court of appeals again considered the interplay between Indiana Trial Rule 72(E) and Appellate Rule 2(A). In *Gable*, when the plaintiff's attorney initiated the action in the trial court, she listed a Greenwood, Indiana, address. Subsequent to filing the complaint, the plaintiff's attorney filed a notice of a change in her address with the clerk of the trial court. The Chronological Case Summary (CCS) contained a mention of that filing and the plaintiff's attorney's new Indianapolis address. On November 28, 1995, summary judgment was entered in favor of the defendant. On December 28, 1995, the plaintiff's attorney filed a motion to correct errors, at the bottom of which she listed her new Indianapolis address. The trial court denied the motion on January 5, 1996, with said denial evidenced in the CCS. The CCS also stated that the plaintiff's attorney was notified of that ruling on January 9, 1996. However, the notice that the motion to correct errors had been denied never made it to the plaintiff's attorney because it was mailed to her Greenwood address. An entry in the CCS reflected that failure, and noted that the mailing was returned because of "insufficient address."⁵⁰

Because the plaintiff's attorney did not receive notification of a ruling on the plaintiff's motion to correct errors, she assumed that the motion had been automatically deemed denied by operation of Indiana Trial Rule 53.3. As a result, she filed a *praecipe* on March 11, 1996, within thirty days of the date she

46. *Id.* at 502 (citations omitted).

47. *Id.* (citations and quotations omitted).

48. *Id.* at 503.

49. 673 N.E.2d 805 (Ind. Ct. App. 1996).

50. *Id.* at 808.

thought her motion to correct errors had been deemed denied. After subsequently learning that the trial court had actually denied the motion to correct errors on January 5, 1996 (and thus, her *praecipe* filed on March 11, 1996 was untimely) plaintiff's attorney requested relief pursuant to Indiana Trial Rule 72(E). The trial court granted that motion, and the appellees argued to the court of appeals that the trial court abused its discretion by so ruling.

The appellees argued that the trial court abused its discretion because the CCS affirmatively evidenced that the notice of the denial of the motion to correct errors had been mailed. In support of their argument, the appellees cited *Collins v. Covenant Mutual Insurance Co.*,⁵¹ and *Minnick v. Minnick*,⁵² which have interpreted Indiana Trial Rule 72(E) "as providing that, where the CCS affirmatively evidences that notice of the final judgment has been mailed by the clerk, the trial court lacks the authority to relieve a party from the consequences of failing to timely file a *praecipe*."⁵³ The court in *Gable* held that those cases were "clearly distinguishable" because the CCS in *Gable* "demonstrates more than mere mailing of the notice by the clerk. The CCS affirmatively demonstrates that [plaintiff's attorney] did not receive the notice because it had been insufficiently addressed."⁵⁴ The court in *Gable* also noted that "the CCS affirmatively demonstrates that [plaintiff's attorney] had provided the clerk with her correct address as required under [Indiana Trial Rule 3.1(E)]."⁵⁵ The court held that to be "mailed" a pleading must be correctly addressed: "[o]bviously, when service is to be made by mail, the papers must be deposited in the United States mail *addressed to the person on whom they are being served*, with postage prepaid."⁵⁶ Therefore, "the clerk's mailing of notice of the denial of the motion to correct error with an insufficient address did not constitute a 'mailing' as contemplated under [Indiana Trial Rule 72(E)]."⁵⁷ Further, "the trial court did not err in giving [plaintiff] an extension in which to file the *praecipe* initiating [the] appeal"⁵⁸

Gable is consistent with *Vaughn*.⁵⁹ Furthermore, *Gable* adds an element to the teaching of *Vaughn*. An appellate attorney, when being proactive in perfecting an appeal, should always, at a minimum, file a *praecipe* within the time requirements of Indiana Trial Rule 53.3. If an appellant has done all she/he can do to preserve her/his rights (as in *Gable*, but unlike in *Vaughn*) an appellate court will likely (and, indeed, should) conclude that it has jurisdiction over the appeal.

4. *Appellate Rule 4(B)(5) and Indiana Trial Rule 76.—Appellate Rule*

51. 644 N.E.2d 116 (Ind. 1994).
52. 663 N.E.2d 1226 (Ind. Ct. App. 1996).
53. *Gable*, 673 N.E.2d at 808.
54. *Id.*
55. *Id.*
56. *Id.* (emphasis added).
57. *Id.*
58. *Id.*
59. See *supra* notes 45-48 and accompanying text.

4(B)(5) expressly requires an interlocutory appeal of an adverse decision regarding preferred venue under Indiana Trial Rule 75, which sets forth the rules for preferred venue.⁶⁰ No mention of Indiana Trial Rule 76—which deals with motions for change of venue or judge—is found anywhere in Appellate Rule 4(B). Yet, the court in *Trojnar v. Trojnar*⁶¹ held that a ruling on a Trial Rule 76 motion must be treated like a Trial Rule 75 ruling: i.e., both require interlocutory appeals pursuant to Appellate Rule 4(B)(5).⁶²

The court in *Trojnar* based its decision on the following reasoning:

At the time of an adverse ruling under T.R. 76, the parties must perfect an appeal. Myriad reasons, including judicial economy and fairness to the parties, dictate that parties may not save an issue which would render all subsequent action moot, allowing litigation on the merits of a claim to the point of an adverse ruling and then appeal matters outside of the merits. To hold otherwise would be to condone a collateral attack on the judgment.⁶³

In a strongly worded dissent, Judge Staton criticized the majority for attempting to “promulgate a new Appellate Rule—a responsibility reserved to the Indiana Supreme Court under the Indiana Constitution.”⁶⁴ In response to Judge Staton’s dissent, the majority wrote:

The dissent’s myopic view of the law would lead to an absurd result. Allowing appeal of a change of judge ruling after the merits of the cause would allow an aggrieved party to wait through protracted proceedings including discovery, preliminary hearings, and trial to nullify all action after the ruling. Reversal of a cause after the decision on the merits based upon a procedural matter is tantamount to “two bites at the apple.” A party displeased with the judgment on the merits could have a second chance by saving an appeal ostensibly based upon the adverse change of judge ruling, but in reality wiping the slate clean on the merits as well.

....

Far from creating new law as asserted by the dissent, our construction of the trial and appellate rules is mandated by our basic tenets of law and judicial disdain for waste. The dissent does not question the basis for the rule in T.R.75 matters, and does not offer explanation as to how the

60. Appellate Rule 4(B)(5) states that an interlocutory appeal must be taken in cases “[t]ransferring or refusing to transfer a case pursuant to Trial Rule 75.” Indiana Trial Rule 75(E) states that: “An order transferring or refusing to transfer a case under this rule shall be an interlocutory order appealable pursuant to Appellate Rule 4(B)(5) . . .”

61. 676 N.E.2d 1094 (Ind. Ct. App. 1997).

62. *Id.* at 1096.

63. *Id.* at 1096-97.

64. *Id.* at 1098 (Staton, J., dissenting).

same type of ruling in T.R. 76 proceedings should render a different result. Clearly, the explicit rule regarding interlocutory appeal of an adverse T.R.75 ruling applies with equal force to T.R.76 matters. Suffice it so say, the mandatory interlocutory appeal evolved to prevent parties from trumping judgments on the merits in the manner attempted here, and “two bites at the apple” has never been the law.⁶⁵

The holding in *Trojnar* must be recognized by appellate practitioners. The safe course of action is to treat a ruling on a Trial Rule 76 motion as a Trial Rule 75 order which “shall be an interlocutory order appealable pursuant to Appellate Rule 4(B)(5).”⁶⁶

5. *Appellate Rule 8.1.*—During the survey period it was re-affirmed an appellant’s failure to file a brief on time does not *automatically* result in “summary dismissal” of an appeal pursuant to Appellate Rule 8.1(A).⁶⁷ However, a court will most likely only forgive a practitioner’s tardiness if that tardiness is slight.

In *Howell v. State*, the appellant’s brief was filed one day late.⁶⁸ The court chose to consider the merits of the appeal anyway, writing:

Rule 8.1(A) does not mandate an automatic dismissal when an appellant has not timely filed its brief. Dismissal for the late filing of an appellant’s brief is within the discretion of this court, rather than mandatory. Because we prefer to decide a case upon its merits, we exercise our discretion to reach the merits when violations are comparatively minor.⁶⁹

The filing of an appellant’s brief on time is not a condition precedent to invocation of an appellate court’s jurisdiction as is the case with the timely filing of a *praecipe*.

6. *Appellate Rule 8.3.*—During the survey period there were several examples, both in Indiana Supreme Court⁷⁰ and court of appeals’ opinions,⁷¹ of cases in which the failure to comply with Appellate Rule 8.3 was both noted,⁷²

65. *Id.* at 1097 n.3.

66. IND. TR. R. 75(E).

67. See *Howell v. State*, 684 N.E.2d 576, 577 n.1 (Ind. Ct. App. 1997).

68. *Id.*

69. *Id.* (citations omitted).

70. See, e.g., *Potter v. State*, 684 N.E.2d 1127 n.1, 1130 (Ind. 1997); *Williams v. State*, 681 N.E.2d 195, 203 (Ind. 1997); *Humphrey v. State*, 680 N.E.2d 836, 842 n.11 (Ind. 1997); *Steele v. State*, 672 N.E.2d 1348, 1351 (Ind. 1996).

71. See, e.g., *Strowmatt v. State*, 686 N.E.2d 154, 158 (Ind. Ct. App. 1997); *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 158 n.4 (Ind. Ct. App. 1997); *Young v. Butts*, 685 N.E.2d 147, 149-51 (Ind. Ct. App. 1997).

72. See, e.g., *Potter*, 684 N.E.2d at 1130 n.1; *Callis v. State*, 684 N.E.2d 233, 235 n.1 (Ind. Ct. App. 1997) (stating that “[c]ounsel for Appellant is advised to observe [Appellate Rule 8.3(A)(4)]”).

and resulted in the waiver of an otherwise valid argument.⁷³ Although it is within an appellate court's discretion to consider an appeal when a party substantially complies with the appellate rules,⁷⁴ exercise of that discretion remains the exception rather than the rule. Consideration of the purpose of Appellate Rule 8.3 provides insight into when a court might exercise that discretion. In *Young v. Butts*,⁷⁵ the court of appeals succinctly reminded practitioners of the purpose behind the many requirements of Appellate Rule 8.3:

[Appellate courts] demand cogent argument supported with adequate citation to authority because it promotes impartiality in the appellate tribunal. A court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues On review, [an appellate court] will not search the record to find a basis for a party's argument, . . . nor will [an appellate court] search the authorities cited by a party in order to find legal support for its position.⁷⁶

Clearly, Indiana's appellate courts have, and continue, to consider Appellate Rule 8.3 and other technical rules on briefing⁷⁷ as "gatekeepers" to their ability to impartially adjudicate an appeal. Failure to comply with those rules will, almost inevitably, lead an appellate court to forego the chance to adjudicate, rather than risk adjudicating (or the appearance of adjudicating) in an impartial manner. For that reason, practitioners must be sure to comply with the procedural safeguards found in Appellate Rule 8.3 while drafting substantive appellate arguments, lest those substantive arguments fall on deaf ears.

7. *Appellate Rule 15(G)*.—During the survey period, Indiana's appellate courts considered the issue of sanctions under Appellate Rule 15(G)⁷⁸ on at least five occasions,⁷⁹ awarding sanctions only once.⁸⁰ A review of those cases

73. See, e.g., *Williams*, 681 N.E.2d at 203. (noting that "[b]ecause [appellant] fails to make a cogent argument with appropriate citations to the record, he has waived this issue").

74. See *Mitchell v. Stevenson*, 677 N.E.2d 551, 555 n.1 (Ind. Ct. App. 1997) (stating that "[d]espite [appellant's] failure to comply with the appellate rules, we will address the merits of the issues before us").

75. 685 N.E.2d 147 (Ind. Ct. App. 1997).

76. *Id.* at 151 (citations omitted).

77. See, e.g., IND. APP. R. 8.1, 8.2 & 8.4.

78. Appellate Rule 15(G) states:

If the court on appeal affirms the judgment, damages may be assessed in favor of the appellee not exceeding ten percent (10%) upon the judgment, in money judgments, and in other cases in the discretion of the court; and the court shall remand such cause for execution.

79. See *Young v. Butts*, 685 N.E.2d 147, 150 (Ind. Ct. App. 1997); *SDL Enters., Inc. v. DeReamer*, 683 N.E.2d 1347, 1350 (Ind. Ct. App. 1997); *Mitchell v. Stevenson*, 677 N.E.2d 551,

provides insight into the type of conduct which will result in the imposition of sanctions pursuant to Appellate Rule 15(G).

In *Young v. Butts*,⁸¹ the court of appeals, pursuant to Appellate Rule 15(G), remanded the case to the trial court “for a determination of the appropriate amount of damages to be awarded” to the appellees for the defense of the appeal.⁸² In so ruling, the court in *Young* set forth the following succinct standards for imposition of sanctions under Appellate Rule 15(G):

Indiana Appellate Rule 15(G) provides that when we affirm a judgment, damages may be assessed in favor of the appellee. Such an award of damages is proper if the appeal is “permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.”⁸³ The sanctions available under rule 15(G) are punitive, so they may not be imposed to punish lack of merit unless an appellant’s contentions and argument are utterly devoid of all plausibility.⁸⁴

The appellant in *Young* failed in several respects to comply with Appellate Rule 8.3.⁸⁵ Perhaps the linchpin of the court’s decision to remand for an award of sanctions was the fact that the arguments of appellant’s counsel were not only “devoid of plausibility,”⁸⁶ but were “based on remarkable mischaracterizations and blatant misstatements of the evidence in the record.”⁸⁷ The court found the appellant’s “number of affirmative misrepresentations of the evidence in the record” to be “particularly offensive because they would, if true, directly affect the propriety of the trial court grant of judgment on the evidence.”⁸⁸ For those reasons, the court found the “appeal to be frivolous, wholly without merit, and

565 n.7 (Ind. Ct. App. 1997); *Yanoff v. Muncy*, 676 N.E.2d 765 (Ind. Ct. App. 1997), *vacated by* 688 N.E.2d 1259 (Ind. 1997), 690 N.E.2d 1190 (Ind. 1997); *John Malone Enters., Inc. v. Schaeffer*, 674 N.E.2d 599, 607 (Ind. Ct. App. 1996); *Powers v. Lacny*, 671 N.E.2d 1215, 1217 (Ind. Ct. App. 1996).

80. See *Young*, 685 N.E.2d at 152.

81. *Id.*

82. *Id.* at 152.

83. *Id.* at 151 (quoting *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987)).

84. *Id.* (citing *Orr*, 512 N.E.2d at 153).

85. See *id.* at 149 n.2 (“We note that Young’s counsel failed to include in his Statement of the Case a verbatim statement of the trial court judgment as required by Ind. Appellate Rule 8.3(A)(4). Young’s Statement of the Case also includes argument, which is inappropriate in that section of an appellate brief.”); *Id.* at 150 (“Because Young’s counsel has not favored us with a cogent argument supported by legal authority and references to the record as our rules require, see Ind. Appellate Rule 8.3(A)(7), we are unable to consider his assertions on appeal.”); *Id.* at 151 (Failure to comply with Appellate Rule 8.2(B)(1) was found in that “there [was] not a single pinpoint citation to be found anywhere in counsel’s eight page argument.”).

86. *Id.* at 151.

87. *Id.* at 150.

88. *Id.* at 151.

brought in bad faith⁸⁹

Contrast *Young* with three other opinions in which Appellate Rule 15(G) was considered.⁹⁰ In *SDL Enterprises v. DeReamer*,⁹¹ the appellee sought imposition of sanctions because the appellant “failed to include several documents in the record and made various misstatements in its brief.”⁹² Although recognizing that those deficiencies in fact existed, the appellate court held that those deficiencies “[did] not rise to the level warranting sanctions.”⁹³ In *DeReamer*, unlike in *Young*, the court noted that “[w]hen reviewing request for sanctions against [an] appellant, [an appellate court] must use extreme restraint to avoid causing a ‘chilling effect upon the exercise of the right to appeal.’”⁹⁴

In *John Malone Enterprises v. Schaeffer*,⁹⁵ like *DeReamer*, the appellee argued that the appellant’s misstatement of the record warranted imposition of sanctions.⁹⁶ The appellee contended that the appellant’s argumentative statement of facts, in conjunction with a misstatement of the record, was “procedural bad faith” sufficient to warrant the imposition of sanctions.⁹⁷ Without further analysis, the court held that “[b]ecause we cannot say that [appellant’s] arguments [were] utterly devoid of all plausibility, an award of damages pursuant to Appellate Rule 15(G) would be inappropriate.”⁹⁸ The court also addressed the appropriateness of an award of attorney fees pursuant to section 34-1-32-1 of the Indiana Code.⁹⁹

89. *Id.*

90. See *SDL Enters. v. DeReamer*, 683 N.E.2d 1347 (Ind. Ct. App. 1997); *John Malone Enters. v. Schaeffer*, 674 N.E.2d 599 (Ind. Ct. App. 1996); *Powers v. Lacny*, 671 N.E.2d 1215 (Ind. Ct. App. 1996). In *Mitchell v. Stevenson*, the appellees’ request for sanctions pursuant to Appellate Rule 15(G) was denied because appellant’s appeal was granted in part. 677 N.E.2d 551, 565 n.7 (Ind. Ct. App. 1997).

91. *SDL Enters.*, 683 N.E.2d at 1347.

92. *Id.* at 1350.

93. *Id.* The court did award the appellee costs in accordance with Appellate Rule 15(H). *Id.*

94. *Id.* (quoting *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 152 (Ind. 1987)); *accord Schaeffer*, 674 N.E.2d at 606-07.

95. 674 N.E.2d 599 (Ind. Ct. App. 1996).

96. *Id.* at 606.

97. *Id.*

98. *Id.* at 607.

99. Section 34-1-32-1 states:

(a) In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.

(b) In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if it finds that either party:

(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;

(2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or

(3) litigated the action in bad faith.

Procedural bad faith on appeal is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. However, conduct can constitute procedural as opposed to substantive bad faith even though the objectionable conduct falls short of being “deliberate or by design.” It depends upon the circumstances of the given case.¹⁰⁰

The court did not find the existence of such procedural bad faith in *Schaeffer*.¹⁰¹

In *Powers v. Lacney*,¹⁰² the appellees based their plea for sanctions on the lack of merit in the appellant’s argument.¹⁰³ There was no assertion, as in *DeReamer* or *Young*, that the appellant misstated the record. The court, without analysis, held that the “appellees [were] not entitled to an award of appellate attorney’s fees.”¹⁰⁴

Based on a review of the above cases, it is clear that appellate courts continue to adhere to the seminal case of *Orr v. Turco Manufacturing Co.*¹⁰⁵ when applying Appellate Rule 15(G). Additionally, at least based on the cases considered above, it appears that more than an occasional misstatement of the record must be present before an appellate court will impose sanctions pursuant to Appellate Rule 15(G). Indeed, courts appear reluctant, as set forth expressly in *DeReamer*¹⁰⁶ and *Schaeffer*,¹⁰⁷ to impose sanctions for fear of chilling the right to appeal.¹⁰⁸ However, that is not to suggest that an appellant can, in total disregard of the Appellate Rules and the appellate process, advance an appeal. Rather, it is simply a recognition that Indiana’s appellate courts allow an appellant wide latitude in constructing arguments; however, that latitude cannot be abused—if it is, appellate courts will not hesitate to impose sanctions.

8. *Appellate Rule 17(B)*.—In last year’s Article discussing this rule, it was observed that the amendment to Appellate Rule 17(B) eliminating the “no reasonable person” standard of review “has the potential for a tremendous impact

(c) The award of fees under subsection (b) does not prevent a prevailing party from bringing an action against another party for abuse of process arising in any part on the same facts, but the prevailing party may not recover the same attorney’s fees twice.

IND. CODE § 34-1-32-1 (1993).

100. *Schaeffer*, 674 N.E.2d at 607 (quoting *Watson v. Thibodeau*, 559 N.E.2d 1205, 1211 (Ind. Ct. App. 1990)).

101. 674 N.E.2d at 607.

102. 671 N.E.2d 1215 (Ind. Ct. App. 1996).

103. *Id.* at 1217.

104. *Id.*

105. 512 N.E.2d 151 (Ind. 1987).

106. 683 N.E.2d 1347, 1350 (Ind. Ct. App. 1997).

107. 674 N.E.2d 599, 606-07 (Ind. Ct. App. 1996).

108. *See supra* note 57.

in criminal appeals.”¹⁰⁹ That impact did not come to fruition during the survey period. However, one case does shed some light on the new Appellate Rule 17(B) standard. In *Mayo v. State*,¹¹⁰ the supreme court considered an appellant’s assertion that his sentence was manifestly unreasonable within the meaning of Appellate Rule 17(B). In considering that assertion, the court in *Mayo*, wrote as follows:

With respect to the claim of overall sentence unreasonableness, we will not revise a sentence authorized by statute unless we find it “manifestly unreasonable in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 17(B). While we recognize that the aggregate sentence is substantial [in this case], we do not find the degree of claimed unreasonableness so clearly apparent as to warrant our concluding that it is *manifestly* unreasonable. We find no sentencing error and decline to revise the sentence.¹¹¹

Therefore, it could be gleaned from *Mayo* that for a sentence to be deemed “manifestly unreasonable” pursuant to Appellate Rule 17(B), that unreasonableness must be “clearly apparent” before a sentence will be revised.¹¹² It is anticipated that during the upcoming year further refinements to Appellate Rule 17(B) will occur.

B. Common Law Appellate Procedural Jurisprudence

1. *Prima Facie Error*.—Indiana’s appellate courts applied the *prima facie error* rule¹¹³ in several cases during the survey period. However, the scope and application of the doctrine is difficult to extract from those cases, as has been apparent with cases considering the *prima facie error* rule in years past.¹¹⁴ Courts appear to apply the *prima facie error* rule in four ways: (1) application of the rule *sub silento*; (2) failure to apply the rule *sub silento*, despite acknowledging its applicability; (3) express application of the rule; and (4)

109. Ammeen, *supra* note 3, at 1172.

110. 681 N.E.2d 689 (Ind. 1997).

111. *Id.* at 695 (emphasis added).

112. *Id.*

113. The *prima facie error* rule was explained in *State v. Lamar*, 680 N.E.2d 540, 542 n.1 (Ind. Ct. App. 1997):

When only the appellant files a brief, [an appellate court] may reverse the trial court if the appellant makes a *prima facie* showing of error. This rule “protects [appellate courts] and relieves [them] from the burden of controverting arguments advanced for reversal, a duty which properly remains with counsel for the appellee.” *Prima facie* error is error at first sight, on first appearance or on the face of it.

Id. (citations omitted).

114. See William O. Harrington, *1994 Developments in Indiana Appellate Procedure: Old Lessons Revisited and the Scope of the Court of Appeals’ Discretion*, 28 IND. L. REV. 985, 990 (1995).

failure to apply the rule despite the ability to do so.

The decision in *Jones v. Harner*¹¹⁵ is illustrative of a decision in which a court acknowledged the applicability of the *prima facie error* rule, then—without expressly exercising its discretion not to apply the rule¹¹⁶—appears to exercise that discretion *sub silento*. In a footnote in *Jones*, the court merely stated the *prima facie error* rule that it “may reverse” the trial court’s judgment because the appellee failed to file a brief.¹¹⁷ Without any further mention of the *prima facie error* rule, the court appeared to address the appeal on its merits.¹¹⁸ The court affirmed and reversed in part the trial court’s entry of judgment.¹¹⁹ It did so without stating that the appellant had made a showing of *prima facie error*. From a review of the opinion, it appears that despite the court’s earlier pronouncement that the *prima facie error* rule “relieves the appellate courts from the burden of controverting the arguments advanced for a reversal,”¹²⁰ the court nevertheless reviewed the record to find evidence to support the non-briefing appellee’s position.¹²¹

Contrast *Jones* with *Kostuck v. Vincent D.*,¹²² in which the court analyzed the appellant’s arguments to ensure that he had established *prima facie error*. The appellate court then reversed the trial court’s decision, expressly stating that its decision to reverse rested on the appellant’s ability to demonstrate *prima facie error*.¹²³ In several other decisions where the *prima facie error* rule was mentioned, the court ordered reversal on appeal.¹²⁴ In these decisions, the appellate court made no express mention (as was done in *Kostuck*) that the appellant made a showing of *prima-facie error*.

In *In re Marriage of Jackson*,¹²⁵ the court recognized the *prima facie error* rule. However, based on the proposition that “it is within [the court’s] discretion to decide a case on the merits,”¹²⁶ the court chose “to exercise that discretion”

115. 684 N.E.2d 560 (Ind. Ct. App. 1997).

116. See *infra* note 125.

117. *Jones*, 684 N.E.2d at 562 n.1.

118. *Id.* at 561-63.

119. *Id.* at 561.

120. *Id.* at 562 n.1.

121. *Id.* at 562 (“The record supports the trial court’s finding [against the appellant].”).

122. 684 N.E.2d 573 (Ind. Ct. App. 1997).

123. *Id.* at 576 (“Landlord has established *prima facie error* in the trial court’s award of damages based on the cost of alternative housing.”).

124. See *Newman v. Wilson*, 682 N.E.2d 1320 (Ind. Ct. App. 1997) (reversal of trial court judgment without controverting appellant’s arguments); *Kokomo Center Twp. Consol. School Corp. v. McQueary*, 682 N.E.2d 1305 (Ind. App. Ct. 1997) (stating the *prima facie error* rule, and reversing the trial court’s failure to enter summary judgment against the appellant without again mentioning the rule); *Taylor v. State*, 675 N.E.2d 1128 (Ind. Ct. App. 1997) (stating the *prima facie error* rule, and reversing revocation of appellant’s probation).

125. 682 N.E.2d 549 (Ind. Ct. App. 1997).

126. *Id.* at 551.

and hear the case on its merits.¹²⁷ The court rested its decision on *Head v. State*,¹²⁸ in which that court similarly exercised its discretion to hear a case on its merits, despite the absence of an appellee's brief.¹²⁹

In considering the differing applications of the *prima facie error* rule, there does not appear to be any consistent basis for how Indiana's appellate courts apply, or refuse to apply the rule. Indeed, because refusing to apply the rule is within the court's "discretion,"¹³⁰ a "bright line" test should not be expected. Nonetheless, the two cases in which the court refused to apply the *prima facie error* rule are interesting in that they both involved particularly sensitive issues: one involved children, the other adult entertainment.

In *Marriage of Jackson*,¹³¹ child support provisions of a divorce decree were at issue.¹³² Specifically, the father-appellant argued that the trial court erred when it ordered him to pay \$15,950 in child support arrearage.¹³³ The mother-appellee failed to file a brief.¹³⁴ The court decided to consider argument in contravention of father-appellant's position, but ultimately still reversed the trial court judgment.¹³⁵

In *Deja Vu*, the trial court entered a preliminary injunction enjoining a tavern/restaurant from operating, *inter alia*,¹³⁶ a part of its business that offered "cabaret style adult entertainment."¹³⁷ The trial court entered the injunction based on its finding that the cabaret style adult entertainment conducted in the tavern/restaurant was in violation of a city ordinance.¹³⁸ *Deja Vu* appealed, but the City of Lake Station failed to file an appellee's brief.¹³⁹

Based on *Marriage of Jackson* and *Deja Vu*, one could speculate that, when dealing with a particularly sensitive issue, an appellate court faced with the failure of an appellee to file a brief will nonetheless expressly opt out of applying the *prima facie error* rule and consider arguments counter to those proffered by an appellant. However, it is interesting that, despite their failure to apply the

127. *Id.*

128. 632 N.E.2d 749 (Ind. Ct. App. 1994); *see also* *Deja Vu of Hammond, Inc. v. City of Lake Station*, 681 N.E.2d 1168, 1170 (Ind. Ct. App. 1997) ("We exercise our discretion to consider the merits of the issue presented.").

129. *Head*, 632 N.E.2d at 750.

130. *Id.*

131. 682 N.E.2d 549 (Ind. Ct. App. 1997).

132. *Id.* at 550.

133. *Id.*

134. *Id.* at 551.

135. *Id.* at 552.

136. *Deja Vu of Hammond, Inc. v. City of Lake Station*, 681 N.E.2d 1168, 1173 n.5 (Ind. Ct. App. 1997). The trial court also enjoined the tavern/restaurant from using part of an addition as "storage building." *Id.* The tavern/restaurant did not appeal that part of the injunction. *Id.*

137. *Id.* at 1170. One might suggest that the *Deja Vu* was "asking for it" when they named the adult entertainment part of their premises the "Bare-ly Legal." *Id.*

138. *Id.*

139. *Id.*

prima facie error rule, the courts in both *Deja Vu* and *Marriage of Jackson* still ruled in favor of the appellants. What ultimately can be gleaned from those cases that considered the *prima facie error* rule in 1996 and 1997? File a brief.¹⁴⁰

2. *Subject Matter Jurisdiction*.—In *City of New Haven v. Chemical Waste Management of Indiana, L.L.C.*,¹⁴¹ the court of appeals considered an issue of first impression related to its subject matter jurisdiction: whether a permissive intervening party in the trial court may maintain an appeal of a judgment when the original parties to the dispute have settled their claims and dismissed the case as between themselves. A brief review of the relevant procedural background in *City of New Haven* is necessary to put the issue in context.¹⁴²

The city filed a complaint to enforce a zoning ordinance, naming the county board of zoning appeals and a chemical company as defendants, alleging that the chemical company was violating the zoning ordinance. The city sought a court order to have the chemical company cease operations. The county zoning administrator issued the injunction by entering several “stop work” orders. The zoning appeals board then filed a complaint for injunctive relief, seeking to enforce the stop work orders which the zoning administrator had entered, and the zoning appeals board affirmed.

Pursuant to Indiana Trial Rule 24(B)(2), the city filed a petition to intervene as a plaintiff in the zoning appeals board enforcement action. The trial court granted the petition and the parties then filed summary judgment motions. The trial court granted in part, and denied in part, the chemical company’s motion. The zoning appeals board, the zoning administrator, and the city filed a joint *praeceipe* for appeal of the adverse rulings. Subsequent to the trial court’s order on the summary judgment motions, the zoning appeals board, the zoning administrator, and the chemical company reached a settlement agreement. The trial court then entered an agreed judgment in both cases dismissing all claims with prejudice. The city, not a party to that agreed judgment, remained the sole appellant.

On appeal, the chemical company argued that a permissive intervening plaintiff, such as the city, could not maintain an appeal once the original parties had been dismissed from the cause of action. “Essentially, [the chemical company asked the court of appeals] to question [its] jurisdiction to hear the . . . appeal.”¹⁴³ The court, in considering that assertion, framed the issue as follows:

Indiana law provides that an intervenor takes the case as he finds it and

140. *Accord* Harrington, *supra* note 114, at 990 (After noting that the developing *prima facie error* rule is “unpredictable,” concluding that: “Appellees should always file a brief. Appellees who fail to do so run the risk that their successes in the trial court will be the subject of a diluted standard of review on appeal.”).

141. 685 N.E.2d 97 (Ind. Ct. App. 1997).

142. There was a “complex procedural background” in *City of New Haven*, which the court of appeals provided in a “somewhat simplified version” *Id.* at 99. The procedural version set forth in this Article is even more simplified; readers are referred to the opinion for more details.

143. *Id.* at 100.

cannot change the issues or raise unrelated issues. Accordingly, one should not be granted permissive intervention if the effect of granting the motion would be to open up new areas of inquiry or raise unrelated issues. Although one who has been granted permissive intervening status cannot later interject new areas of inquiry or raise unrelated issues, the question remains as to what rights the intervening party has to continue to pursue issues raised by the original parties where those parties have decided to settle and/or dismiss the case as between themselves.¹⁴⁴

Because of the lack of Indiana authority on point, the court turned to federal cases that had addressed the same issue under Federal Rule of Civil Procedure 24. Accordingly, the court noted that “[t]he weight of authority in the United States Court[s] of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action.”¹⁴⁵ However:

Most of the circuits that have reached that conclusion have set standards for determining under what circumstances an intervening party may continue to litigate after dismissal of the original party and have generally adopted, *inter alia*, the approach that an intervenor may continue provided that an independent basis for jurisdiction exists.¹⁴⁶

The chemical company urged the court of appeals to find that it lacked independent jurisdiction over the appeal, and thus to dismiss the appeal.¹⁴⁷ The court rejected that argument. Recognizing the difference between federal and state subject matter jurisdiction, the court stated: “The power of this court to hear appeals is not limited by the same parameters as the federal circuit courts of appeals.”¹⁴⁸ In Indiana, “[p]rovided that certain procedural requirements are met, appeals may be taken by either ‘party’ from all final judgments and from interlocutory orders under specified circumstances.”¹⁴⁹

The court then held that although

one who is not a party or has not been treated as a party to a lawsuit has no right to appeal from a judgment rendered therein . . . one who is not an original party to a lawsuit may of course become a party and, in effect, gain the right to appeal, by intervention, substitution or third-party practice.¹⁵⁰

Therefore, because the city was a proper intervenor, and because there was no

144. *Id.* at 100-01 (citations omitted).

145. *Id.* at 101 (quoting *Benavidez v. Eu*, 34 F.3d 825, 830 (9th Cir. 1994) (second alteration in original)).

146. *Id.* (emphasis added).

147. *Id.*

148. *Id.* at 102.

149. *Id.* (citing IND. APP. R. 4(A) & (B)).

150. *Id.*

indication the city failed to meet the appellate procedural requirements to bring an appeal, the city had a right to appeal the trial court's judgment "to the extent that it [was] adverse to those interests which made intervention possible in the first place."¹⁵¹

II. RULE CHANGES EFFECTIVE JANUARY 1, 1998

Effective January 1, 1998, the supreme court amended Appellate Rules 2, 2.1, 4, 7.2, 8.2, 11, 14, and 15.

A. *Appellate Rule 2*

1. *Appellate Rule 2(C).*—Certainly the most significant of the 1998 amendments to the Appellate Rules are the changes found in Appellate Rule 2. Sub-parts 2(A) and 2(B) to Appellate Rule 2 remain unchanged from their 1997 form. However, the 1997 form of sub-part 2(C)—"Court of Appeals Pre-Appeal Conference"—has been eliminated. The new sub-part 2(C)—"Court of Appeals Notice of Appeal"—requires that:

Any party seeking an appeal or review by the Supreme Court or the Court of Appeals, shall file a notice of appeal with the Clerk of the Supreme Court, Court of Appeals and Tax Court. The filing of a notice of appeal will satisfy the requirement to file an appearance pursuant to Appellate Rule 2.1.¹⁵²

Douglas E. Cressler, the Administrator of the Indiana Supreme Court, has written that "the principal purpose for the new [Rule 2(C)] is to provide the appellate courts a basis for case management."¹⁵³ The notice *shall* be filed within "fourteen (14) days of the filing of the praecipe or, in the case of an interlocutory appeal under Appellate Rule 4(B)(6), with the petition to the Court of Appeals requesting permission to file an interlocutory appeal"¹⁵⁴ The notice must set forth the following information: Party Information;¹⁵⁵ Trial Information;¹⁵⁶

151. *Id.*

152. IND. APP. R. 2(C).

153. Douglas E. Cressler, *Appellate Practice From Inside The Indiana Supreme Court Administrator's Office*, THE APPELLATE ADVOCATE, Spring 1998, at 5.

154. IND. APP. R. 2(C)(1).

155. *Id.* The following must be included in the required "Party Information":

(a) Name, address and telephone number of the parties initiating the appeal or review;
(b) Name, address, attorney number, FAX number, telephone number and computer address, if any, of the attorneys representing the parties initiating the appeal or review; and (c) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

Id.

156. *Id.* The following must be included in the required "Trial Information":

(a) Title of case; (b) Trial court or other tribunal; (c) Case number; (d) Name of trial judge; (e) Date case initially commenced; (f) Date of judgment or order; (g) Whether

Record Information;¹⁵⁷ and Appeal Information.¹⁵⁸ The following documents must be attached to that notice of appeal:

- (a) In civil cases, a copy of the judgment or order appealed from, to include findings of fact and conclusions, where made; (b) In criminal cases, a copy of the judgment or order appealed from, to include any sentencing order; (c) A copy of any motion to correct errors filed in the trial court; and (d) A copy of the *praecipe*.¹⁵⁹

If a party fails to file the notice of appeal, then “[t]he Clerk of the Supreme Court and Court of Appeals shall not accept for filing any record, motion, or other documents of the proceedings, until the notice of appeal has been filed.”¹⁶⁰ Thus, the filing of a notice of appeal is, in effect, a condition precedent to the timely filing of the record.¹⁶¹

It is interesting to note that the ramifications for failing to timely file the notice of appeal are not couched in absolute terms. That is, although the notice of appeal has to be filed “within fourteen (14) days of the filing of the *praecipe*” or an interlocutory petition,¹⁶² Appellate Rule 2(C)(2) states only that the various filings will not be accepted “until the notice of appeal has been filed.”¹⁶³ Appellate Rule 2(C)(2) does *not* state that the various filings shall

trial was by judge or jury; (h) Synopsis of judgment and sentence, if applicable; and (i) Case type using classification in Administrative Rule 8(B)(3).

Id.

157. *Id.* The following must be included in the required “Record Information”:

- (a) Date *praecipe* was filed; (b) Date record is due to be filed; and (c) The following transcript information: 1) Name, address and telephone number of court reporter responsible for preparing transcript; 2) Date ordered (or reason it has not been ordered); 3) Payment arrangements; 4) Estimated length of transcript; 5) Estimated time required for preparation; and 6) Estimated completion date.

Id.

158. *Id.* The following information must be included in the required “Appeal Information”:

- (a) A short and plain statement of the anticipated issues on appeal; provided, however, that the statement of anticipated issues shall not prevent the raising of any issue on appeal; (b) Prior appeals in same case; (c) Related appeals (prior, pending or potential) known to the party; (d) Indication whether a request for oral argument is anticipated; (e) Pre-appeal conference request; if desired, include purpose of proposed conference; (f) Criminal cases—status of defendant (i.e. on bond, incarcerated and, if so, where); (g) Civil cases—whether Alternative Dispute Resolution has been used and whether it should be used on appeal; and (h) Certification that case does or does not involve issues relating to custody, support, visitation or parental relationship of a child.

Id.

159. *Id.*

160. IND. APP. R. 2(C)(2).

161. *See* IND. APP. R. 3(B) (time within which the record must be submitted).

162. IND. APP. R. 2(C)(1).

163. IND. APP. R. 2(C)(2).

never be accepted if the notice of appeal is not filed within that fourteen day period.¹⁶⁴

Implicitly, then, Appellate Rule 2(C)(1) could be read to allow a party who fails to submit the notice of appeal within the fourteen day period to have up until the eve of the deadline(s) for submitting the record¹⁶⁵ in which to submit the notice of appeal. It will be interesting to see how the appellate courts apply Appellate Rule 2(C) if (and when) that situation arises, and whether failure to strictly adhere to the Appellate Rule 2(C) deadline will mean that the appellate courts will refuse to hear an appeal, as is the case when an appellant fails to comply with, for example, Appellate Rule 2(A).¹⁶⁶

In response to the question "What happens if no notice of appeal is filed?", Douglas Cressler, Administrator of the Indiana Supreme Court, has written:

The rule itself, as amended, provides that "[t]he Clerk of the Supreme Court and Court of Appeals shall not accept for filing any record, motion, or other documents of the proceedings, until the notice of appeals has been filed." App.R.2(C)(2)(1998). [T]hat provision is only being enforced if the praecipe was filed in 1998. If the praecipe was filed in 1998 and a motion or record is tendered without a notice of appeal having been previously or contemporaneously submitted, the appellate courts are allowing such materials to be "received" rather than filed. Counsel for the appellant will then be contacted by the Clerk's office about the deficiency. Once the notice of appeal is filed, the previously received documents will be shown as "filed" and processed accordingly. The courts may (and probably will) decide to adopt a more rigid interpretation of the rule after it has been in effect for awhile.¹⁶⁷

Thus, it appears that Indiana's appellate courts will not strictly construe Appellate Rule 2(C) *yet*. As it is unclear from the above when that lenient construction of the Rule will be lifted, practitioners are cautioned not to rely on the above as persuasive authority for avoiding whatever consequences may lie for failing to comply with Appellate Rule 2(C).

164. In a preliminary draft of the revised Appellate Rule 2(C), monetary sanctions would have been imposed if an appellant failed to file the notice of appeal. *See*, Ammeen, *supra* note 3, at 1186 n.115. Under that version of the rule it would appear that the notice of appeal is not a jurisdictional requirement. However, such a clear cut "sanction" is not found in the 1998 version of Appellate Rule 2(C), leaving the issue open to interpretation.

165. *See* IND. APP. R. 3(B).

166. *See* Jennings v. Davis, N.E.2d 810 (Ind. Ct. App. 1994) (finding that filing of praecipe 31 days after entry of final judgment resulted in dismissal of appeal); Koons v. Great Southwest Fire Ins. Co., 530 N.E.2d 780 (Ind. Ct. App. 1988) (failure to timely file the record results in dismissal because of lack of subject matter jurisdiction); *see also* Ammeen, *supra* note 3, at 1186. ("Substantial issues still must be resolved before a docketing statement can be instituted. For example, should filing the docketing statement be jurisdictional or simply a notice?").

167. Cressler, *supra* note 153, at 6.

2. *Appellate Rule 2(D)*.—The only substantive change¹⁶⁸ to Appellate Rule 2(D) is that parties may now request a preappeal conference.¹⁶⁹ In the 1997 version of Appellate Rule 2(D), it was only the court of appeals that had the ability to “direct” such a conference.¹⁷⁰ Under the new Appellate Rules, the court of appeals has retained that power, only now, in addition, the conference can be requested by an appealing party.¹⁷¹

B. Appellate Rule 2.1(A)

Two changes are found in the 1998 version of Appellate Rule 2.1(A). First, it is no longer a requirement that “[i]n the case of an interlocutory appeal under Appellate Rule 4(B)(6), the appearance form shall be filed with the petition to entertain jurisdiction.”¹⁷² Second, “[t]he filing of a notice of appeal pursuant to Appellate Rule 2(C) will satisfy the requirement to file an appearance” under Appellate Rule 2.1(A).¹⁷³ Thus, the notice of appeal has a dual purpose.

C. Appellate Rule 4(C)

Appellate Rule 4(C) has been the subject of some interesting appellate decisions over the last few years.¹⁷⁴ The court in *Sneed v. Associated Group Insurance*¹⁷⁵ held that the procedures in the Appellate Rules take precedence over conflicting statutory procedures.¹⁷⁶ At issue in *Sneed* was whether the failure to file an assignment of errors, which was not required by the Appellate Rules¹⁷⁷ (but was required by statute¹⁷⁸), meant that the appellate court did not have jurisdiction to consider the merits of the appeal.¹⁷⁹ At the time of the *Sneed* decision, Appellate Rule 4(C) stated that “[i]t shall be unnecessary to file a separate assignment of errors in the court of appeals to assert that the decision of any board, agency, or other administrative body is contrary to law.”¹⁸⁰ The 1998 version of Appellate Rule 4(C) states that “[i]t shall be unnecessary to file an

168. The internal numbering of the rule has changed. IND. APP. R. 2(D).

169. *Id.*

170. *Id.*

171. *Id.*

172. See IND. APP. R. 2.1 (amended 1998).

173. *Id.*

174. For an excellent discussion of those cases, see Harrington, *supra* note 114, at 993-96; Ammeen, *supra* note 3, at 1173-74.

175. 663 N.E.2d 789 (Ind. Ct. App. 1996).

176. *Id.* at 794.

177. The court in *Sneed* held that, although the version of Appellate Rule 4(C) in effect at the time of an appeal required the filing of an assignment of errors, the subsequently amended version of Appellate Rule 4(C), which did not require the filing of an assignment of errors, nonetheless applied. *Id.* at 797.

178. IND. CODE § 22-3-4-8 (1993).

179. *Sneed*, 663 N.E.2d at 791.

180. IND. APP. R. 4(C) (amended 1998).

assignment of errors in the court of appeals to assert that the decision of any board, agency, or other administrative body is contrary to law.”¹⁸¹ Although the change is subtle—from “a separate assignment” to “an assignment”—the change can be read to implicitly clarify and affirm the *Sneed* decision. The 1998 version removes language that could be read to acknowledge the possibility that a party needs to file “a separate” assignment, even if such an assignment is required by a conflicting statutory provision, as in *Sneed*.

D. Appellate Rule 7.2(B)

The 1998 version of Appellate Rule 7.2(B) has been amended in two respects: the first substantive; the second stylistic. The first change to Appellate Rule 7.2(B) requires the appellant, rather than the trial court clerk, to “transmit the whole record to the court on appeal.”¹⁸² This change firmly places the burden on an appellant to ensure that an appellate court has the whole record.

The second change is an elimination of the italicized portion of the following:

Neither party shall request parts of the record or a transcript of the proceedings which are not needed for the issues to be asserted upon appeal, *including without limitation the following*: The pleadings or parts thereof not related to a claimed error; the verdict, when the form, language or its scope is not in issue; evidence or parts thereof which is not involved in the appeal or related to the error claimed; instructions, tendered instructions, findings or proposed or omitted findings which are not in issue; evidence, other instructions or findings or pleadings or parts thereof which are not particularly related to instructions, tendered instructions, findings, or proposed or omitted findings claimed to be erroneous; or motions and orders or rulings thereon not connected with the error claimed.¹⁸³

Clearly, the supreme court believes that, with respect to the specificity of Appellate Rule 7.2(B), less is better. The change is not substantive, as it simply removes the “including without limitation” clause and leaves a less-detailed, albeit substantively the same, mandate.¹⁸⁴ Regardless of the form and specificity of Appellate Rule 7.2(B), a party is still required to submit to the court of appeals those parts of the record or transcript which are needed for the issues on appeal.¹⁸⁵

181. IND. APP. R. 4(C).

182. Compare IND. APP. R 7.2(B) (1997), with IND. APP. R. 7.2(B) (1998).

183. Compare IND. APP. R. 7.2(B) (1997), with IND. APP. R. 7.2(B) (1998).

184. Perhaps all that can be gleaned from the change is that the supreme court wants to remove from an appealing party the argument that one of the formerly enumerated parts of the record or transcript was not requested because the 1997 Appellate Rule 7.2(B) explicitly stated that that part of the record was “not needed for the issues to be asserted upon appeal.”

185. IND. APP. R. 7.2(B).

E. Appellate Rule 11(B)

The requirements for a petition for transfer continue to evolve. Three changes to Appellate Rule 11(B) are effective in 1998. The first change is the addition of the following italicized language:

Within thirty (30) days from an adverse decision in the Court of Appeals or, in the event a petition for rehearing *from an adverse decision* is filed in the Court of Appeals, within thirty (30) days from the disposition of such petition, a party may petition the Supreme Court to transfer the case.¹⁸⁶

The second change is the addition of the following language:

A published opinion, an unpublished memorandum decision, or an order dismissing an appeal issued by the Court of Appeals may be considered an adverse decision for purposes of petitioning for transfer. Any other order issued by the Court of Appeals, including an order denying a petition for interlocutory appeal under Appellate Rule 4(B)(6), shall not be considered an adverse decision for purposes of petitioning for transfer, regardless of whether rehearing is sought.¹⁸⁷

Finally, the court has reduced the length of the petition to transfer from 1400 to 1000 words.¹⁸⁸

CONCLUSION

During the survey period, Indiana's appellate courts continued to refine and, in some cases, re-define, appellate procedure. The Indiana Supreme Court continues to refine the Appellate Rules. While in some cases these changes have added clarity to the appellate process, other changes have, in fact, clouded the process. However, as long as appellate practitioners are aware of the changes, then the murkiness of certain rules can be factored in to any procedural decisions so that an appellant or appellee's rights are not forfeited due to procedural errors.

186. IND. APP. R. 11(B).

187. *Id.*

188. *Id.*

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ*

INTRODUCTION

Over the past few years, the area of insurance law has been the subject of much attention by the courts and lawmakers. Likewise, for this past survey period¹ there were a number of decisions addressing issues affecting the insurance industry such as an insurer's duty to defend, insurance agent liability, and cancellation of insurance policies for misrepresentations by the insured. These decisions will be discussed in this Article.²

I. THE INSURER'S DUTY TO DEFEND

During this survey period, the Indiana Court of Appeals decided a controversial case which imposed a greater burden upon insurers before they can deny coverage for a claim. In *Monroe Guaranty Insurance Co. v. Monroe*,³ the Indiana Court of Appeals imposed a requirement upon an insurer to conduct a reasonable investigation of all claims before it could determine whether it has a duty to defend.⁴ At first glance, such a requirement would seem reasonable. However, the decision is contrary to existing Indiana Supreme Court precedent⁵ and imposes an unreasonable requirement upon insurers to investigate claims which clearly lack coverage. Nevertheless, this decision should be kept in mind on all questions involving the insurer's duty to defend.

In *Monroe*, an employee filed an action against his employer contending that the employer "intentionally" caused injury to the employee at the worksite by requiring him to perform difficult jobs when the employee could not use his right

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1. The survey period for this Article is approximately September 1, 1996, to August 1, 1997.

2. Practitioners may wish to review the other decisions not addressed in this Article which include: *Angleton v. Estate of Angleton*, 671 N.E.2d 921 (Ind. Ct. App. 1996) (denying life insurance proceeds to beneficiary who killed decedent); *Hightshue v. AIG Life Ins. Co.*, 939 F. Supp. 1350 (S.D. Ind. 1996), *aff'd*, 135 F.3d 1144 (7th Cir. 1998) (clarifying standard of review for challenge of denial of benefits under ERISA plan); *Ansert v. Adams*, 678 N.E.2d 839 (Ind. Ct. App. 1997) (denying insured's claim of bad faith by insurer for refusal to pay claim); *United Farm Bureau Mut. Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, 678 N.E.2d 1165 (Ind. Ct. App. 1997) (discussing conflicts in "other insurance" provisions); *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889 (7th Cir. 1996) (holding insured's defamatory statements did not trigger advertising injury coverage).

3. 677 N.E.2d 620 (Ind. Ct. App. 1997).

4. *Id.* at 624.

5. *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991) (holding that an insurance company has no duty to defend when the claim is obviously not covered by the policy).

arm.⁶ The employer submitted the employee's claim to its insurer. The insurer denied coverage based solely upon a review of the employee's Complaint.⁷ Specifically, the insurer contended that because the employee's claim clearly stated that the employer "intentionally" caused the employee's injuries, the Worker's Compensation and Employers Liability Policy did not provide coverage as there was no "accident."⁸

The employer denied that it intentionally caused injury to the employee.⁹ Instead, the employer contended that it did not know of the employee's limitation and that the job he was to perform did not require the use of his right arm.¹⁰ In essence, the employer's argument suggested that it could have "accidentally" but not "intentionally" caused the employee's injuries and that coverage was owed.¹¹

In a prior decision, the Indiana Supreme Court analyzed an insurer's duty to defend by stating that it was to be "determined *solely* by the nature of the complaint."¹² A number of appellate decisions following the *Kopko* decision have analyzed the duty by stating: "[t]he insurer's duty to defend is determined from the allegations of the complaint coupled with those facts known to or ascertainable by the insurer after reasonable investigation."¹³

The *Monroe* court radically departed from the *Kopko* precedent by requiring an insurer to conduct a "reasonable investigation into the facts underlying the complaint" before making a decision on the duty to defend.¹⁴ The troubling aspect of the *Monroe* decision is that no investigation by the insurer could possibly lead to a finding of coverage based upon the allegations of the Complaint. The theory against the insured was for "intentional" conduct, as clearly identified in the Complaint, which could not be covered under the insured's policy.¹⁵ Thus, the insured's claim that his conduct was not "intentional" was irrelevant to the coverage obligation. If the insured's actions were merely negligent, the claim against the insured would be barred by Indiana's Worker's Compensation Act,¹⁶ which prohibits negligence claims by

6. *Monroe*, 677 N.E.2d at 621. One of the allegations of the employee's Complaint stated: "Because [the employer] either intended to injure Plaintiff or knew injury was certain to occur, Plaintiff's second injury was not 'by accident' and thus is not included under Indiana's Workers Compensation Statute, I.C. §22-3-2-6." *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991) (emphasis added).

13. *See Trisler v. Indiana Ins. Co.*, 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991); *see also Wayne Township Bd. of Sch. Comm'r's v. Indiana Ins. Co.*, 650 N.E.2d 1205, 1208 (Ind. Ct. App. 1995).

14. *Monroe*, 677 N.E.2d at 624.

15. *Id.* at 621.

16. *See IND. CODE § 22-3-2-6 (1993).*

employees against employers unless the claim falls outside the exclusivity provision of the Act.

The impact of the *Monroe* decision now imposes an obligation upon insurers to conduct a reasonable investigation even if the allegations of the Complaint facially demonstrate a lack of coverage. The *Monroe* decision will likely spawn a new round of litigation to decide what is a "reasonable" investigation by an insurer. Insurers facing a factual situation such as what existed in *Monroe* now must be aware of this significant burden and maintain accurate and complete records of their investigation even though it may be clear that no coverage would be owed for the claim.

Another case which addressed the duty to defend owed by an insurer is *Indiana Farmers Mutual Insurance Co. v. Ellison*.¹⁷ In this case of first impression, a grandchild was sexually molested by her grandfather in the presence of the grandmother.¹⁸ These molestations occurred over a number of visits even after observation by the grandmother.¹⁹ The grandchild eventually sued the grandmother for negligence and the grandmother tendered the claim to her homeowners insurance company for coverage.²⁰

The insurance company refused to defend or indemnify claiming that coverage was excluded for bodily injuries "expected or intended" by the grandmother.²¹ After a declaratory judgment action was filed, the matter proceeded to trial and a judgment was entered finding the existence of a duty of the insurance company to defend the suit for the grandmother.²² On appeal, the court focused upon the insurer's duty to defend by weighing the evidence.²³ Because the grandmother observed the molestations and still permitted the grandchild to be exposed to the grandfather for additional molestations, the court concluded that the evidence demonstrated that the grandmother was "consciously aware" of the molestations.²⁴ Thus, the court determined that coverage was excluded and the insurer owed no duty to defend.²⁵

II. INSURER'S LIABILITY FOR AGENT ACTIONS

During the survey period, two significant decisions addressed an insurance company's liability for actions of the agent and deserve attention. In *Fidelity &*

17. 679 N.E.2d 1378 (Ind. Ct. App. 1997).

18. *Id.* at 1380.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1381.

23. *Id.* at 1382.

24. *Id.* The Indiana Court of Appeals has defined the term "expected" in an insurance policy as being when an insured is "consciously aware that the injury was practically certain in result." *Indiana Farmers Mut. Ins. Co. v. Graham*, 537 N.E.2d 510, 512 (Ind. Ct. App. 1989).

25. *Ellison*, 679 N.E.2d at 1382.

Casualty Co. v. Tillman Corp.,²⁶ a corporation was having difficulty obtaining worker's compensation insurance. The corporation used an individual named Layden to attempt to acquire coverage under Indiana's Assigned-Risk Pool through the Indiana Compensation Rating Bureau.²⁷ The Bureau assigned the coverage to an insurer who issued a binder for a thirty day policy pending an audit to determine the amount of premium.²⁸ The corporation then sent a large sum of money to Layden for the premium which he embezzled.²⁹

The question addressed by the Seventh Circuit was whether Layden was an agent of the corporation or the insurer which would determine who would bear the loss.³⁰ The magistrate decided that Layden was the agent of the corporation and entered summary judgment in favor of the insurer³¹ relying upon prior Indiana precedent which established that "[a]n intermediary in the insurance business is the agent of the insured while shopping for a policy, and the agent of the insurer after a policy issues."³²

While the corporation had submitted the premium money to Layden after the binder had been submitted, the Seventh Circuit concluded that Layden was still the agent of the corporation and not the insurer.³³ Applying the facts of the case, the court found that the corporation rather than the insurer should bear the loss in this case because the insurer had no control or influence over Layden.³⁴

While *Tillman* may be on its face a departure from Indiana's "brightline" test concerning insurance agency liability, the case applies a well-established factual analysis to determine agency. Because there was little control by the insurer over the agent, the corporation had the better opportunity to prevent the loss.

Another case involving actions of an agent is *Wiggam v. Associates Financial Services of Indiana, Inc.*,³⁵ where the question addressed was whether an agent's representations may override the express language of an insurance policy application.³⁶ In 1986, the insured acquired life and disability insurance in connection with a loan.³⁷ In his loan application, there were two separate boxes which contained the amount of premium for each form of coverage.³⁸ After the insured signed the application, the loan was approved and the insured

26. 112 F.3d 302 (7th Cir. 1997).

27. *Id.* at 303.

28. *Id.*

29. *Id.*

30. *Id.* at 303-04.

31. *Id.* at 304.

32. *Id.* at 304 (citing *Benante v. United Pac. Life Ins. Co.*, 659 N.E.2d 545, 547 (Ind. 1995); *Aetna Ins. Co. v. Rodriguez*, 517 N.E.2d 386 (Ind. 1988)).

33. *Id.* at 306.

34. *Id.* at 305.

35. 677 N.E.2d 87 (Ind. Ct. App. 1997).

36. *Id.* at 90.

37. *Id.* at 88.

38. *Id.*

received both forms of coverage.³⁹

In 1988, the insured acquired another loan from the same company.⁴⁰ The exact same application form was used and the insured signed the box to acquire life but not disability insurance associated with this loan.⁴¹ After the insured became disabled, he sought disability coverage under both loans but discovered that he only had it for the 1986 loan.⁴² The insured contended that his agent had assured him that he had both forms of coverages for the 1988 loan as he had for the 1986 loan.⁴³ The agent denied making any such representations.⁴⁴

After suit was filed to recover the insurance proceeds, the insurer filed a summary judgment motion contending that the application demonstrated lack of coverage.⁴⁵ The insured contended that a factual dispute existed to prevent the entry of summary judgment due to the agent's representations.⁴⁶

In affirming the trial court's grant of summary judgment, the Indiana Court of Appeals determined that the loan application was not complex and clearly demonstrated a lack of coverage.⁴⁷ Because the loan application was short and easily understood, the court distinguished the *Wiggam* facts from another Indiana case that determined that an agent's alleged misrepresentations could override the express terms of a complex insurance policy.⁴⁸

Wiggam reaffirms an insurance company's ability to require its insureds to read and be bound by noncomplex policy terms. With most policies having multiple endorsements, riders and provisions, an agent's representations about the policy are significant and should be limited unless absolutely necessary.

III. CANCELLATION AND REVOCATION OF POLICIES

During the survey period, two cases were decided addressing the cancellation and revocation of policies which may be of interest to insurance practitioners. In *Federal Kemper Insurance Co. v. Brown*,⁴⁹ a father sought to obtain automobile insurance for his stepson to replace the existing coverage which was about to be canceled.⁵⁰ After the father informed the agent that the stepson had received a number of speeding tickets, the agent told the father that coverage for

39. *Id.*

40. *Id.*

41. *Id.* at 88-89.

42. *Id.* at 89.

43. *Id.* at 90.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 91.

48. *Id.* In *Medtech Corp. v. Indiana Insurance Co.*, the court determined that an agent's representations which contradicted policy terms excused an insured's failure to read the policy provisions because of the policy's complexity. 555 N.E.2d 844 (Ind. Ct. App. 1990).

49. 674 N.E.2d 1030 (Ind. Ct. App. 1997).

50. *Id.* at 1032.

the son would cost in excess of \$1000 per year.⁵¹ The agent, in order to save the father money, completed an application misrepresenting that the father's spouse was the only other driver in the household.⁵² The father signed the application and a policy was issued.⁵³

Later, the stepson was involved in an accident resulting in serious injuries to two individuals.⁵⁴ The injured parties' had uninsured/underinsured motorist coverage which paid for treatment of their injuries and the insurer retained subrogation rights to pursue the stepson.⁵⁵ The father's auto insurer filed suit to rescind the policy covering the stepson.⁵⁶

On appeal, the court rejected the father's argument that the misrepresentations were made by the agent.⁵⁷ Because the father knew the facts to be incorrect, but nevertheless signed the application, the father was deemed to have made the misrepresentations.⁵⁸

The more significant issue addressed by the court focused upon the uninsured/underinsured motorist carrier's argument that Indiana public policy prevented cancellation of the policy because of the harm which resulted to injured third parties.⁵⁹ However, the court determined that public policy was not violated because the injured persons had purchased uninsured/underinsured motorist coverage.⁶⁰ While the uninsured/underinsured motorist coverage may not have been sufficient to cover the extent of the injured party's loss, the statutory minimum coverage⁶¹ available satisfied Indiana's policy.⁶² Consequently, the stepson's automobile carrier could rescind the policy based upon the father's misrepresentations without violating public policy.⁶³

IV. INTERPRETATION OF POLICY DEFINITIONS AND TERMS

A number of cases were decided by the Indiana appellate courts which interpreted the definitions of various policy terms. The cases define such terms as "household," "land motor vehicle," and "ownership, maintenance and use" as

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1033.

58. *Id.* at 1035.

59. *Id.* (citing *American Underwriters Group, Inc. v. Williamson*, 496 N.E.2d 807, 810-11 (Ind. Ct. App. 1986)). As stated by the court, "we have held that an insurance company may not rescind a policy of insurance on the ground of fraud or misrepresentation in procuring the insurance policy so as to escape liability to third persons." *Id.*

60. *Id.* at 1036.

61. See IND. CODE § 27-7-5-2 (Supp. 1997); IND. CODE § 9-25-4-5 (1993).

62. *Federal Kemper Ins. Co.*, 674 N.E.2d at 1036.

63. *Id.* at 1037.

they are used in insurance policies. The implications of the court's holding as it pertains to each term are addressed in the following sections.

A. Definition of "Household"

An interesting factual scenario existed in *Erie Insurance Exchange v. Stephenson*⁶⁴ which has broad implications for insurers. A grandmother became sick and moved to her daughter's home.⁶⁵ Her grandson stayed at the grandmother's home paying the utility bills but no rent.⁶⁶ The grandmother maintained the homeowner's insurance and the real estate taxes.⁶⁷

The grandson was entertaining some friends when a bottle rocket struck one of the friends in the eye.⁶⁸ Almost four years later the friend filed a lawsuit against the grandson to recover for the eye injury.⁶⁹

One of the issues addressed by the court was whether the grandson was entitled to liability coverage as a resident of the grandmother's "household."⁷⁰ The insurer argued that because the grandmother had moved from the home, the grandson was no longer part of her "household" and, therefore, was not entitled to coverage.⁷¹

The court determined that the insurer owed coverage to the grandson.⁷² In applying the facts of the case to its interpretation of "household," the court held that a person could be a resident of more than one household.⁷³ Thus, despite the fact that the grandmother no longer lived in the home, it still was her home for insurance coverage purposes.⁷⁴ This decision supported the insured's intent to provide insurance coverage for the premises even though she may not have resided at the home.⁷⁵

B. Definition of "Land Motor Vehicle"

The definition of a "land motor vehicle" has significance to many potential factual scenarios within insurance law. For example, a construction of the

64. 674 N.E.2d 607 (Ind. Ct. App. 1996).

65. *Id.* at 609.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 610. The policy language permitted coverage for "certain residents of the homeowner's 'household.'" *Id.*

71. *Id.*

72. *Id.*

73. *Id.* ("[W]e conclude that there is no requirement that members of a household live under the same roof. (citation omitted). Thus, it is possible to maintain two households or to live as a member of one household and still be the 'domestic head' of a separate household."). *Id.*

74. *Id.*

75. *Id.* The decision also contained an excellent discussion of an insured's obligation to give timely notice of an accident to the insurer and the effects of a failure to do so. *Id.* at 610-13.

definition may determine whether coverage is available to an insured under either an automobile or homeowner policy for a particular factual scenario. The decision of *Erie Insurance Co. v. Adams*⁷⁶ is beneficial in construing the meaning of this term.

In *Adams*, a friend of the insured grandson severed a thumb while working on a dismantled El Camino at the insured's home.⁷⁷ After the friend filed suit, the insured sought coverage under her homeowner's policy and the insurer contended that no coverage was owed because of an exclusion for claims of bodily injury arising out of the "ownership, maintenance or use of . . . any land motor vehicle . . .".⁷⁸

The court entered into a factual analysis of whether the dismantled El Camino was a "land motor vehicle." The El Camino had been driveable when first purchased but had not been driven for almost a year.⁷⁹ The El Camino did not have a body, seats, brakes or engine and was described by the insured as "wheels and a frame."⁸⁰ Based upon the clearly inoperable condition of the El Camino (most notably the absence of a motor), the court determined as a matter of law that it was not a motor vehicle as that term was intended to trigger the exclusion.⁸¹

C. Interpretation of "Ownership, Maintenance, or Use" of a Motor Vehicle

Another decision interpreting a different section of the "motor vehicle" exclusion is *Westfield Insurance Co. v. Herbert*.⁸² A sixteen year old son of the insured discovered oil was leaking through a valve cover in his car's engine, so he decided to replace the cover.⁸³ After removing the old cover, the son decided to clean and sell it.⁸⁴ After soaking the cover in gasoline, the son decided to burn the cover to remove the gasket which resulted in an explosion injuring a young girl.⁸⁵ After the young girl filed suit, the homeowner's insurer claimed that coverage was excluded because the son was involved in "maintaining" the motor vehicle.⁸⁶

76. 674 N.E.2d 1039 (Ind. Ct. App. 1997).

77. *Id.* at 1040.

78. *Id.*

79. *Id.* at 1040, 1043.

80. *Id.* at 1040.

81. *Id.* at 1043.

82. 110 F.3d 24 (7th Cir. 1997).

83. *Id.* at 26.

84. *Id.*

85. *Id.*

86. The actual exclusion provided that coverage was excluded for bodily injury arising out of "the ownership, maintenance, use, loading or unloading of motor vehicles or other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured." *Id.* at 26.

The court narrowly construed the exclusion to find it inapplicable.⁸⁷ Because the accident did not occur while the son was working on his car but when he was cleaning an automobile part for later resale, the son was not engaged in maintenance upon the car to trigger the exclusion.⁸⁸ The key to this decision appears to be that the automobile part that the son was cleaning would not be used again within the automobile so that no maintenance was being performed upon the vehicle.⁸⁹

D. Interpretation of "Use" of a Motor Vehicle

Another decision addressing the meaning of "use" under an insurance policy but for a different purpose is *Allstate Insurance Company v. Cincinnati Insurance*.⁹⁰ The insured asked a fellow employee, a mechanic, to inspect her vehicle for a gasoline problem.⁹¹ When the employee raised the car on a hoist, some gasoline leaked and caught fire causing extensive property damage.⁹² In an attempt to collect for the property damage, a lawsuit was filed against the employee⁹³ which ultimately required an insurance coverage determination of whether the mechanic was "using" the vehicle in order to be an additional insured under the auto insurance.⁹⁴

The court of appeals concluded that the mechanic was not "using" the automobile to trigger a coverage obligation.⁹⁵ In making this determination, the court distinguished cases where the policy terms "arising out of the ownership, maintenance or use" of an automobile was construed differently by other courts.⁹⁶ The court clarified that the terms "maintenance" and "use" were not synonymous.⁹⁷ Consequently, the mechanic's work upon the car did not constitute "use" as required to establish coverage.⁹⁸

The meaning of "using" a vehicle for an occupation was addressed in *Alderfer v. State Farm Mutual Automobile Insurance Co.*⁹⁹ A volunteer

87. *Id.* at 27.

88. *Id.*

89. *Id.*

90. 670 N.E.2d 119 (Ind. Ct. App. 1996).

91. *Id.* at 120.

92. *Id.*

93. After a default judgment was entered against the employee, the plaintiff attempted to collect insurance proceeds from the vehicle owner's insurer by claiming the employee was covered. *Id.*

94. *Id.* In order for the mechanic to qualify as an insured under the policy, he must have been "using" the automobile. *Id.*

95. *Id.* at 122.

96. *Id.* at 121. See, e.g., *Indiana Lumbermens Mut. Ins. Co. v. Statesman Ins. Co.*, 291 N.E.2d 897 (Ind. 1973).

97. *Allstate Ins. Co.*, 670 N.E.2d at 121.

98. *Id.* at 122.

99. 670 N.E.2d 111 (Ind. Ct. App. 1996).

firefighter was seriously injured when another firefighter pinned him with a fire truck.¹⁰⁰ The second firefighter had a personal liability policy which excluded coverage for non-owned vehicles “used in any other business or occupation.”¹⁰¹ The insurer relied upon the exclusion to avoid a coverage obligation.¹⁰²

The court ruled that the exclusion unambiguously applied because the term “any other business or occupation” was “all inclusive” and did not just apply to the principal business or occupation.¹⁰³ The firefighter was engaged in a “business or occupation” which was excluded under the policy even though he worked on a volunteer basis.¹⁰⁴

E. Interpretation of “Occurrence” in Claim for Negligent Hiring

An interesting factual coverage question was presented in the decision of *Erie Insurance Co. v. American Painting Co.*¹⁰⁵ The insured, a painting contractor, was sued by a customer for negligent hiring and retention of an employee who allegedly burglarized and set fire to the customer’s home.¹⁰⁶ The insurance company claimed that no coverage was owed because there was no “occurrence” to trigger coverage for the hiring and retention of the employee.¹⁰⁷ The insurance contract defined the term “occurrence” as “an accident, including continuous or repeated exposure to the same general, harmful conditions.”¹⁰⁸

The court, in a very short opinion without much analysis, agreed with the insurer and found that no coverage existed.¹⁰⁹ The court found that the insured’s action in hiring and retaining the employee was “intentional” and not “accidental” as required to show an “occurrence” and activate a coverage obligation.¹¹⁰

V. MISCELLANEOUS DECISIONS

A. Interpretation of Assault and Battery Exclusion

The decision of *Sans v. Monticello Insurance Co.*¹¹¹ is one of many decisions addressing whether insurance coverage is available to an individual who discharges a gun resulting in personal injuries to another. In *Sans*, a bartender

100. *Id.* at 111-12.

101. *Id.* at 112.

102. *Id.*

103. *Id.* at 113.

104. *Id.*

105. 678 N.E.2d 844 (Ind. Ct. App. 1997).

106. *Id.* at 845.

107. *Id.*

108. *Id.* at 846.

109. *Id.*

110. *Id.*

111. 676 N.E.2d 1099 (Ind. Ct. App. 1997).

ordered the plaintiff to leave the bar.¹¹² When the plaintiff reentered the bar, the bartender produced a gun that discharged and injured the plaintiff.¹¹³ After the plaintiff brought suit, the insurance company for the bar sought to exclude coverage for the incident by claiming that an exclusion for assault and battery applied.¹¹⁴

The bar produced an affidavit in response to the insurer's summary judgment motion that the bartender did not intend to fire the gun or shoot the plaintiff.¹¹⁵ The court held that it could not infer as a matter of law that the bartender intended to shoot the gun.¹¹⁶ Instead, the court found the existence of a material issue of fact, namely "intent," prevented the granting of summary judgment.¹¹⁷

The insurance cases dealing with claims for coverage for gunshots require a close look at the facts when being applied to other factual scenarios. The *Sans* case should not be interpreted to prevent the granting of a summary judgment denying coverage in situations where the facts demonstrate that an insured either intended or was consciously aware that harm would occur from the shooting of a gun.¹¹⁸ It is anticipated that individuals representing insureds and injured victims will cite *Sans* in an attempt to defeat an insurer's summary judgment motion to exclude coverage for incidents involving the discharge of a gun. A close look at the facts of each case may demonstrate significant differences and lead to a varied outcome.

B. Insurer's Independent Subrogation for Medical Payments

In *Erie Insurance Co. v. George*,¹¹⁹ an insured received payments for medical expenses from his own insurance company under the Medical Payments coverage.¹²⁰ Erie advised the insured that it possessed subrogation rights under the policy and intended to pursue its own claim against the tortfeasor to recover

112. *Id.* at 1100.

113. *Id.*

114. *Id.* at 1100-01. The exclusion provided:

It is agreed that the insurance does not apply to bodily injury or property damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person.

Id. at 1101.

115. *Id.* at 1100.

116. *Id.* at 1103.

117. *Id.* at 1104.

118. For example, the facts of the following cases demonstrated that coverage was excluded because of the insured's conduct. *Home Ins. Co. v. Nielson*, 332 N.E.2d 240 (Ind. App. 1975) (insured's admission that he struck plaintiff but did not intend to injure); *Allstate Ins. Co. v. Herman*, 551 N.E.2d 844 (Ind. 1990) (shooting gun into crowd of people with intent to injure somebody).

119. 681 N.E.2d 183 (Ind. 1997).

120. *Id.* at 185.

the amounts.¹²¹ The insured retained his own counsel to pursue a personal injury claim and objected to the insurer's attempt to pursue an independent subrogation lawsuit.¹²²

The trial court concluded that the insurer did not have a separate right to pursue subrogation until the insured reached a settlement with or obtained a judgment against the tortfeasor.¹²³ The court of appeals reversed.¹²⁴ The supreme court reversed the court of appeals and determined that the insurance company could not pursue a separate action for subrogation without the consent of the insured.¹²⁵ A number of reasons were given for this decision including the prohibition against claim splitting, duplicative litigation, and prevention of the insurer from avoiding expense sharing.¹²⁶ The supreme court also acknowledged that the insured possesses the right to control the litigation while the insurer's interest is only secondary.¹²⁷ The insurer may acquire control of the litigation by entering into an express agreement with the insured granting that right.¹²⁸ The policy of insurance, alone, is insufficient to permit the insurer to proceed.¹²⁹

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 184.

126. *Id.* at 192-93.

127. *Id.* at 193-94.

128. *Id.*

129. *Id.* at 194.

RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

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INTRODUCTION

Although the Indiana courts issued few product liability decisions during this survey period (October 1996 to October 1997), the courts clarified the definition of a user or consumer, established further guidelines for the proof of causation and product identification, addressed the issue of disclaimers in the context of strict product liability, and considered a number of important defenses to product liability claims.

I. DEFINITION OF “USER”/“CONSUMER”

In *Estate of Shebel v. Yaskawa Electric America, Inc.*,¹ the Indiana Court of Appeals further interpreted who is a “user or consumer” under the Indiana Product Liability Act (the “Act”).² The Act provides that a “user or consumer” is:

[A] purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.³

In contrast, the court pointed to a provision defining a “seller” as “a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor.”⁴

To gain the benefit of the statute of repose,⁵ the defendant manufacturer argued that one of the product’s distributors became a “user or consumer” when it took delivery of the product and “used” it as a demonstrator model. The Indiana Court of Appeals held that the statutory scheme does not contemplate an entity engaged in the business of product sales becoming a “user or consumer.”

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1. 676 N.E.2d 1091 (Ind. Ct. App. 1997).

2. IND. CODE §§ 33-1-1.5-1 to -10 (1993 & Supp. 1997).

3. *Id.* § 33-1-1.5-2(1).

4. IND. CODE § 33-1-1.5-2 (1993). The definition of “seller” was changed in 1995 to read “‘seller’ means a person engaged in the business of selling or leasing a product for resale, use, or consumption.” IND. CODE § 33-1-1.5-2(5) (Supp. 1997).

5. IND. CODE § 33-1-1.5-5 (1993).

even though the product may have been “used” during demonstrations.⁶ The court cited its decision in *Whittaker v. Federal Cartridge Corp.*⁷ in which it held that the statute of repose did not begin to run until delivery to a retail customer—not a retailer—even though the products in issue had been delivered to the retailer thirty-four and thirteen years before suit was filed.⁸ The *Whittaker* court considered the term “seller” and the terms “user and consumer” to be mutually exclusive.⁹

The *Shebel* court also reviewed its decision in *Thiele v. Faygo Beverage, Inc.*¹⁰ In that case, the definition of “user or consumer” was held to exclude intermediaries in the distributive chain.¹¹ In *Shebel*, the court found Indiana precedent clear: the simple delivery of a product to a distributor for resale will not qualify that distributor or retailer as an “initial user or consumer.”¹² Furthermore, “a distributor does not become an ‘initial user or consumer’ by receiving delivery of the product for resale or by using the product in a demonstration.”¹³ The court reasoned that the distributor who had used the product as a demonstration model only did so for the “obvious purpose” of demonstrating the product to encourage potential buyers.¹⁴ Thus, the “use” of the product “was for purposes consistent with and in furtherance of activities of a dealer or distributor interested in . . . sales, not a user or consumer interested in using [a product] in a manufacturing or other similar setting.”¹⁵

II. CAUSATION AND PRODUCT IDENTIFICATION

In *Harris v. Owens-Corning Fiberglas Corp.*,¹⁶ the Seventh Circuit reviewed a district court’s grant of summary judgment to the defendant in an asbestos wrongful death case. The plaintiff alleged that her husband died from lung cancer caused by exposure to the defendant’s airborne asbestos.¹⁷ The district court found the plaintiff had “failed to produce evidence to support a reasonable inference that [the defendant’s] products caused her husband’s lung cancer.”¹⁸ The evidence against the defendant came principally from two men who had worked with the plaintiff’s husband, neither of whom knew the decedent nor could distinguish the generic asbestos product manufactured by any number of

6. *Estate of Shebel*, 676 N.E.2d at 1091.

7. 466 N.E.2d 480 (Ind. Ct. App. 1984).

8. *Id.* at 481-82.

9. *Id.* at 482.

10. 489 N.E.2d 562 (Ind. Ct. App. 1986).

11. *Id.* at 588.

12. *Estate of Shebel*, 676 N.E.2d at 1093.

13. *Id.*

14. *Id.*

15. *Id.* at 1093-94.

16. 102 F.3d 1429 (7th Cir. 1996).

17. *Id.* at 1431.

18. *Id.*

companies from the defendant's asbestos product. As a result, the court held that the plaintiff failed to meet the burden of producing sufficient evidence of causation.¹⁹ The court of appeals noted that the plaintiff "actually proved it is no more likely and perhaps less likely that [the defendant's asbestos] product caused her husband's illness as opposed to any of the many other asbestos products" at the site.²⁰ "When at best, the possibilities are evenly balanced, the court should enter judgment for the defendant on the ground that causation cannot be proved."²¹

The Indiana Court of Appeals addressed issues of proximate cause, intervening causes, and superseding causes in *Wolfe v. Stork RMS-Protecon, Inc.*²² In a prior case, the court held that the doctrine of intervening cause was incorporated into Indiana's comparative fault system.²³ But the court in *Wolfe* affirmed summary judgment for the defense on the basis that an intervening cause served to break the causal chain.²⁴

In *Wolfe*, the plaintiff was injured when her smock became caught in a turning bolt that protruded from a conveyor at which she was working. The defendant, Stork, had sold the conveyor and the conveyor's motor to the plaintiff's employer. Originally, the motor had been mounted directly onto the shaft of the conveyor pulley, and no coupler was required. Sometime after the original installation, however, the plaintiff's employer requested that the motor be replaced. The replacement motor was ordered directly from another supplier. "Stork was not involved in any way with the manufacturing, ordering, sale, delivery, or installation of the new motor."²⁵

The new motor and the manner in which it was installed differed substantially from the original. The replacement motor was not directly mounted onto the conveyor but required the use of a coupler. The motor and the coupler were connected by a bolt that turned as the motor turned. The coupler also had several different-sized bolts sticking out of it. One of these bolts caught Wolfe's sleeve and pulled her into the machinery. The original configuration, as supplied by Stork, had no coupler, nor did it have any protruding turning bolts.

None of Stork's representatives had any knowledge of the modification to the conveyor. As the only remaining defendant, Stork moved for summary judgment, arguing its conduct was not the proximate cause of the plaintiff's injuries. The trial court granted the summary judgment motion, and the court of

19. *Id.* at 1433.

20. *Id.*

21. *Id.* (citations omitted).

22. 683 N.E.2d 264 (Ind. Ct. App. 1997).

23. See *L.K.I. Holdings, Inc. v. Tyner*, 658 N.E.2d 111, 119 (Ind. Ct. App. 1995) ("Intervening cause . . . acknowledges a defendant's negligence, yet absolves the defendant of liability when the negligence is deemed remote. The adoption of comparative negligence, with its apportionment of fault, renders the protection of a remote actor unnecessary.").

24. *Wolfe*, 683 N.E.2d at 268-69.

25. *Id.* at 266.

appeals affirmed.²⁶

Based on Stork's lack of involvement in the replacement of the conveyor motor, the *Wolfe* court held that it was not reasonably foreseeable that the conveyor system sold by Stork would undergo substantial alterations.²⁷ Consequently, the court concluded that the replacement of the conveyor motor with the addition of the protruding, turning bolts constituted the sole proximate cause of the plaintiff's injury and served to cut off Stork's liability.²⁸ In reaching this decision, the court attempted to distinguish its prior decision in *L.K.I. Holdings, Inc. v. Tyner*,²⁹ where it was decided that the doctrine of intervening cause had been incorporated into Indiana's comparative fault system.³⁰ The *Wolfe* court reasoned that the situation before it differed in that the plaintiff failed to establish that her injuries were proximately caused, even remotely, by Stork.³¹ While this distinction makes some sense, it is unclear why the court would have couched its decision in intervening cause language if it never considered Stork to be a causative force. To maintain consistency, it seems the decision could have focused on the defense that the cause of the harm was a post-delivery modification or alteration of the product.³²

III. FEDERAL PREEMPTION

In *Chambers v. Osteonics Corp.*,³³ the Seventh Circuit addressed whether an artificial hip recipient's claims against the hip manufacturer were preempted by the Medical Device Amendments ("MDA") of 1996 to the Food Drug and Cosmetics Act ("FDA").³⁴ The hip prosthesis was manufactured as a Class III medical device under an FDA investigational device exemption.³⁵ As part of its

26. *Id.* at 269.

27. *Id.* at 268-69.

28. *Id.* at 269.

29. 658 N.E.2d 111 (Ind. Ct. App. 1995).

30. *Id.* at 119.

31. *Wolfe*, 683 N.E.2d at 269 n.1.

32. See IND. CODE § 33-1-1.5-4(b)(3) (Supp. 1997).

33. 109 F.3d 1243 (7th Cir. 1997).

34. The court applied the Supremacy Clause, U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding") to a conflict that arose between 21 U.S.C. § 360k (1994) and sections 26-1-2-314 (1993) and 33-1-1.5-3(a) (Supp. 1997) of the Indiana Code. See *Chambers*, 109 F.3d at 1246.

35. See 21 U.S.C. § 360(a)(1)(C) (1994).

Class III medical devices are those which operate to sustain human life, are of substantial importance in preventing impairment of human health, or pose a potential unreasonable risk of illness or injury. The [investigational device exemption] process allows a manufacturer with an experimental device to obtain FDA approval for the device with a less rigorous review process than usual. The purpose of the exemption is to encourage experimentation that would lead to new developments.

application for the investigational device exemption, Osteonics represented to the FDA that the prosthesis would need certain metallurgical hardness specifications and that each device would be x-rayed for metallurgical defects. The plaintiff sued Osteonics on the theories of strict liability, breach of implied warranties, and negligent manufacturing. The negligent manufacturing claims were based on evidence that the device did not meet the requisite hardness specifications and that the device contained metallurgical flaws.³⁶

The court held that the plaintiff's strict liability and breach of implied warranty claims were preempted because both imposed greater requirements on the product manufacturer than the applicable FDA requirements.³⁷ The negligent manufacturing claim of the plaintiff, however, was not preempted.³⁸ The court reasoned that the negligent manufacturing claim would not impose any greater requirements on the product manufacturer than the FDA imposed.³⁹ According to the court, such a claim should not be preempted because "there is no reason to protect a manufacturer who fails to follow the proscribed requirements and procedures for producing a device."⁴⁰ The court further noted that there was no reason to read the MDA as preempting state negligence law when it seeks only to enforce the standards and procedures set out by the FDA:

[W]e do not think that allowing a negligence claim that seeks to enforce FDA standards will discourage experimentation in the medical device field. Rather we think it will encourage manufacturers to conduct these experiments pursuant to FDA requirements, taking care not to expose consumers to unnecessary risk. Although some risk is necessary when experimenting with new medical devices, the FDA has set the level of acceptable risk for each device. We see no reason to protect a manufacturer who fails to heed FDA requirements.⁴¹

In another MDA preemption case decided by the Seventh Circuit, the court provided a defacto checklist of product liability claims that are and are not preempted by the MDA. In *Mitchell v. Collagen Corp.*,⁴² the plaintiff asserted claims of strict liability, negligence, mislabeling, misbranding, adulteration, fraud through misrepresentation and false advertising, and breach of express and implied warranties over a Class III medical device for which Collagen had obtained pre-market approval.⁴³

After initially granting summary judgment for Collagen, the Seventh Circuit reconsidered the case in light of the Supreme Court's decision in *Medtronic, Inc.*

Chambers, 109 F.3d at 1245 (citations omitted); *see also* 21 U.S.C. § 360j(g) (1994).

36. *Chambers*, 109 F.3d at 1245.

37. *Id.* at 1248.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. 126 F.3d 902 (7th Cir. 1997).

43. *Id.* at 913-14.

*v. Lohr.*⁴⁴ Relying on the Supreme Court's analysis in *Medtronic*, the Seventh Circuit decided that the pre-market approval process constitutes the sort of federal regulation of a product that can have preemptive effect.⁴⁵ Then, after reviewing its decision in *Chambers v. Osteonics*⁴⁶ and similar decisions from other federal circuits, the *Mitchell* court reached several conclusions. In order to determine whether a common law cause of action is preempted by FDA regulations, the state law cause of action must be examined "to determine whether the final judgment of the state court would impose on the manufacturer a burden incompatible with the requirements imposed by the FDA."⁴⁷ If the plaintiff alleges that the manufacturer departed from the FDA-imposed standards, those claims would not be preempted because they would not impose different or additional requirements from the FDA.⁴⁸ If the state law claims "attempt to substitute a reasonableness analysis, characteristic of negligence claims, for the judgment of the FDA in approving [the product] in the course of the pre-market approval [("PMA")] process,"⁴⁹ those claims would be preempted.⁵⁰

Applying this analysis to the state law claims asserted by the plaintiff in *Mitchell*, the Seventh Circuit held that the defect claims were preempted; that the negligence claims were preempted to the extent that they alleged Collagen was negligent despite its adherence to FDA standards; that the mislabeling, misbranding, and adulteration claims were preempted to the extent that they claimed Collagen was liable despite its conformity to the requirements of the PMA; and, that the misrepresentation claim was preempted to the extent that it was based on the labeling of the product in conformity with the PMA requirements.⁵¹ The court also found that the implied warranty claim was based on the accepted standards of design and manufacture of the product as approved in the PMA process and thus was preempted.⁵² The plaintiff's express warranty claim, however, was not preempted. Since express warranties arise from the representations of the parties and are made as the basis of the bargain between them, express warranties do not interfere with the PMA process.⁵³

IV. DISCLAIMERS IN THE PRODUCT LIABILITY CONTEXT

The Indiana Supreme Court addressed whether parties may disclaim liability with respect to a product covered under the Indiana Product Liability Act.⁵⁴ In

44. 116 S. Ct. 2240 (1996).

45. *Mitchell*, 126 F.3d at 911.

46. 109 F.3d 1243 (7th Cir. 1997).

47. *Mitchell*, 126 F.3d at 912.

48. *Id.*

49. *Id.* at 913.

50. *Id.*

51. *Id.* at 913-14.

52. *Id.* at 914.

53. *Id.*

54. McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp., 678 N.E.2d 1120

1978, Northeastern Rural Electric Membership Corporation ("Northeastern") purchased electrical power station equipment from McGraw-Edison for about \$71,000.⁵⁵ The purchase agreement included a limitation of liability among its "Standard Terms and Conditions." This limitation of liability purported to disclaim Northeastern's liability for any claim arising out of the contract or the design, manufacture, sale, delivery, resale, installation, repair, and operation of any equipment furnished under the contract.⁵⁶ Four years later, a fire broke out at the Northeastern substation resulting in property damage and other losses in excess of \$750,000.⁵⁷ Northeastern claimed that the fire was caused by an electric surge that the McGraw-Edison equipment failed to block from the transformer. Northeastern sued McGraw-Edison under Indiana's Product Liability Act, alleging that the equipment had been defectively designed.⁵⁸

McGraw-Edison moved for partial summary judgment based upon its contractual limitation of liability.⁵⁹ The appellate court affirmed a denial of summary judgment, holding that the limitation of liability was unenforceable under Indiana law.⁶⁰

Before the Indiana Supreme Court, McGraw-Edison argued that freedom of contract and the Uniform Commercial Code prohibited sophisticated parties from invoking the Indiana Product Liability Act.⁶¹ The court noted that other jurisdictions had reached varying conclusions as to the effect of a disclaimer of liability in a commercial transaction.⁶²

The Indiana Supreme Court held that the Indiana General Assembly contemplated that the Act would apply to commercial transactions as well as to consumer products.⁶³ While noting that Indiana law generally supports the proposition that contracts should be enforced, the court emphasized that the Product Liability Act does not identify as a defense the seller's inclusion of a liability limitation in its sales documents.⁶⁴

McGraw-Edison argued that, if the court permitted the Act to trump its disclaimer, no product liability issue could be settled by agreement. The Indiana Supreme Court disagreed, reasoning that Indiana law contemplated "knowing waivers before or after a claim has arisen."⁶⁵ The court, in an opinion by Justice Boehm, held:

(Ind. 1997).

55. *Id.* at 1121.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1122; *see also* IND. CODE § 26-1-2-719 (1993).

62. *McGraw-Edison Co.*, 678 N.E.2d at 1122.

63. *Id.* at 1123.

64. *Id.*

65. *Id.* at 1123-24.

If a true negotiation over risk allocation occurs, and specific language is used, or proof of knowing assumption of risk is offered, it may be that even a strict liability statute may be waived. But that does not appear in the record here, and we are not faced with that issue today. This record does not establish even a conspicuous and explicit provision barring strict liability claims. At least that much is required to establish waiver or "acceptance of risk," . . . even by a commercial buyer.⁶⁶

The court concluded that "the legislature has chosen to override the considerations of freedom of contract in the interest of encouraging safety of products and responsibility for products that are defective under the standards imposed by the statute."⁶⁷

Justice Sullivan strongly dissented from the majority opinion.⁶⁸ Justice Sullivan agreed that, in appropriate circumstances, Indiana courts will enforce private agreements between sophisticated business entities that allocate the economic risk of products liability.⁶⁹ He disagreed, however, on the definition of these circumstances.⁷⁰ Justice Sullivan criticized the majority opinion for announcing a rule of law mandating that any disclaimer as to product liability constitutes a knowing waiver of the purchaser's rights.⁷¹ He argued that the Act would permit a seller to be relieved of product liability when "the total circumstances of the transaction indicate the buyer's awareness of defects or acceptance of risk."⁷² In Justice Sullivan's opinion, the majority "transforms this 'total circumstances' test into a 'knowing waiver' test."⁷³ He writes:

Justice Boehm would find a knowing waiver only where (i) the underlying transaction was between "truly large and 'sophisticated' organizations," (ii) "the amount of money involved . . . was very large," and (iii) "the parties did not simply trade printed forms, but rather entered into true negotiations over all the terms and conditions, including the allocation of risks from product defects and the contract exclusively waives strict liability claims."⁷⁴

This definition of the total circumstances exception was a pure "policy choice by this court, not . . . mandated by the legislature,"⁷⁵ admonished Justice Sullivan. He said that the total circumstances exception should not be limited "to only 'truly large organizations,' to deals where the amount of money involved is 'very

66. *Id.* at 1124.

67. *Id.* at 1125.

68. *Id.* at 1125-27 (Sullivan, J., dissenting).

69. *Id.* at 1125.

70. *Id.*

71. *Id.*

72. *Id.* (quoting *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 431 (N.D. Ind. 1965)).

73. *Id.* (quotations in original).

74. *Id.* (quotations in original).

75. *Id.* at 1126.

large,' or to contracts where the parties use 'printed forms,'⁷⁶ only the requirement that the buyer be sophisticated should be imposed.⁷⁷ Justice Sullivan concluded on this sound observation: "Freedom of contract permits a corporate purchaser to exercise its business judgment to forego claims for liability in exchange for a lower price. As a general matter, it should be for the marketplace, and not the courts, to decide whether such business judgments are correct."⁷⁸

V. DEFENSES TO STRICT PRODUCT LIABILITY

A. Sophisticated Intermediary Exception

In *Natural Gas Odorizing, Inc. v. Downs*,⁷⁹ a family whose house exploded following an undetected natural gas leak sued the natural gas supplier and the supplier of the odorant used in the natural gas. The supplier of the odorant moved for summary judgment, and the trial court granted the motion in part and denied it in part.⁸⁰ The defendant appealed, and the plaintiffs cross-appealed.

One of the several issues addressed on appeal was whether the odorant supplier's duty to warn extended to the plaintiffs.⁸¹ The odorant supplier argued that it had a duty to warn only the natural gas supplier.⁸² The Indiana Court of Appeals disagreed, stating: "[T]he duty to warn extends to 'any user or consumer' in the 'class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.'⁸³ The manufacturer, seller, or distributor of a product "has a duty to warn those persons it should reasonably foresee would be likely to use its product or who are likely to come into contact with the danger inherent in the product's use."⁸⁴ Therefore, the manufacturer has a duty to warn the ultimate user of a product when the ultimate user is "a party the manufacturer should expect to use the product."⁸⁵ Because the plaintiffs were among the class of persons that the odorant supplier could have reasonably foreseen as being subject to the dangers associated with the odorant, the court held that the odorant supplier's duty to warn extended to the plaintiffs.⁸⁶

The odorant supplier next contended that its duty to warn was satisfied even though the plaintiffs did not receive any warnings about the dangerous characteristics of the odorant. The odorant supplier argued that, because the

76. *Id.*

77. *Id.*

78. *Id.* (citations omitted).

79. 685 N.E.2d 155 (Ind. Ct. App. 1997).

80. *Id.* at 158.

81. *Id.*

82. *Id.* at 162.

83. *Id.* (quoting IND. CODE § 33-1-1.5-3(a) (Supp. 1997)).

84. *Id.*

85. *Id.*

86. *Id.*

natural gas company was a “sophisticated intermediary,” the odorant supplier’s duty to warn the plaintiffs had been discharged.⁸⁷ The court noted that “warnings generally must be given to the ultimate user or consumer.”⁸⁸ Thus, “the duty to warn is non-delegable.”⁸⁹ Several exceptions permitting delegation of one’s duty to warn, however, have been articulated.⁹⁰ Under the sophisticated user exception, for instance, the duty to warn is limited by the fact that the dangers about the product are already known to the user.⁹¹ Under the sophisticated intermediary exception, the manufacturer may be considered to have satisfied its duty to warn by relying upon an intermediary to inform the ultimate users or consumers.⁹² Several factors are to be considered in determining whether a manufacturer has satisfied its duty to warn by relying on a sophisticated intermediary:

[T]he likelihood or unlikelihood that harm will occur if the [intermediary] does not pass on the warning to the ultimate user, the trivial nature of the probable harm, the probability or improbability that the particular [intermediary] will not pass on the warning and the ease or burden of the giving of the warning by the manufacturer to the ultimate user.⁹³

In order for a manufacturer to rely on a “sophisticated intermediary, the intermediary must have knowledge or sophistication equal to that of the manufacturer or supplier, and the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer. Reliance is only reasonable if the intermediary knows or should know of the product’s dangers.”⁹⁴ According to the court, the question of “[w]hether a manufacturer has discharged its duty under the sophisticated intermediary doctrine is almost always a question for the trier of fact.”⁹⁵ The *Downs* case was remanded so that the trier of fact could determine whether the odorant supplier had satisfied its duty to warn by providing cautionary information to a sophisticated intermediary.⁹⁶

A recent federal district court decision, *Baker v. Monsanto Co.*,⁹⁷ is noteworthy for its consideration of the sophisticated user exception to the Indiana Product Liability Act. In *Baker*, the plaintiffs claimed that they were injured as a result of their exposure to polychlorinated biphenyls (“PCBs”) manufactured

87. *Id.*

88. *Id.* at 163.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (alteration in original) (citing *Dole Food Co. v. North Carolina Foam Indus. Inc.*, 935 P.2d 876, 881 (Ariz. Ct. App. 1996)).

94. *Id.* at 164.

95. *Id.*

96. *Id.* at 164-65.

97. 962 F. Supp. 1143 (S.D. Ind. 1997).

by the defendant and present at the plaintiffs' work sites. The plaintiffs maintained that the defendant had a duty to warn them of PCBs present in the products it supplied to plaintiffs' employer. The plaintiffs first argued that the duty to warn was non-delegable and that the defendant breached its duty by failing to inform them of the known dangers posed by PCBs.⁹⁸ The plaintiffs next argued that, even if the duty was delegable, the defendant "failed to discharge that duty by failing to inform [the plaintiffs' employer] of the known dangers PCBs posed to humans."⁹⁹

In contrast, the defendant contended the plaintiffs' employer was a knowledgeable and sophisticated bulk purchaser of the defendant's products containing PCBs and knew of the dangers posed by PCBs.¹⁰⁰ The defendant relied on several facts: that it sold its products to the employer in fifty-five gallon barrels bearing labels warning of the dangers associated with using the fluids; that it could not possibly label the liquids directly; and, that it could neither control the use of its products within the employer's plant nor control the instructions the employer gave employees handling the fluids.¹⁰¹ The defendant argued that courts in other jurisdictions have expressly applied the doctrine of the sophisticated and knowledgeable bulk purchaser as a defense to failure to warn claims.¹⁰²

To counter the defendant's arguments, the plaintiffs relied on the Indiana Court of Appeals decision in *Jarrell v. Monsanto Co.*¹⁰³ In that case, the manufacturer supplied fifty pound bags of sulphur to the plaintiff's employer with labels warning against "creating dust in handling" and informing the user that "sulphur dust suspended in the air ignites easily."¹⁰⁴ The sulphur ignited when the plaintiff emptied the bag into a storage bin at his employer's plant causing the plaintiff to suffer extensive burns. The court in *Jarrell* declared that the duty to warn is non-delegable.¹⁰⁵ Nonetheless, the *Baker* court considered the *Jarrell* holding to be an incorrect application of Indiana law.¹⁰⁶ The *Jarrell* court cited the Indiana Supreme Court's decision in *Hoffman v. E.W. Bliss Co.*¹⁰⁷ for the proposition that a manufacturer may not delegate its duty to warn.¹⁰⁸ However, as the *Baker* court noticed, the *Hoffman* decision expressly provides that, under appropriate circumstances, a manufacturer's duty to warn ultimate users may be delegated.¹⁰⁹

98. *Id.* at 1147.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. 528 N.E.2d 1158 (Ind. Ct. App. 1988).

104. *Id.* at 1161.

105. *Id.* at 1164.

106. *Baker*, 962 F. Supp. at 1148.

107. 448 N.E.2d 277 (Ind. 1993).

108. *Jarrell*, 528 N.E.2d at 1164, 1165.

109. *Baker*, 962 F. Supp. at 1148 (discussing *Hoffman*, 448 N.E.2d at 286).

The district court further noted that Indiana courts “have consistently held that a manufacturer’s duty to warn the ultimate user of its product may be delegated by adequately warning a third party.”¹¹⁰ Moreover, the *Baker* court declined to adopt the *Jarrell* holding because the *Jarrell* court discussed whether the manufacturer’s warnings to the plaintiff’s employer were adequate, despite its declaration that a manufacturer’s duty to warn is not delegable to a third party such as an employer.¹¹¹ The *Jarrell* court drew upon factors outlined in the Restatement (Second) of Torts¹¹² such as “the dangerous nature of the product, the form in which the product is used, the intensity and form of the warnings given, the burdens to be imposed by requiring warnings, and the likelihood that the particular warning will be adequately communicated to those who will foreseeably use the product.”¹¹³ In *Jarrell*, since the manufacturer had access to the handlers of the bags through warning labels, the court recognized an issue with respect to whether the bags of sulphur were adequately labeled.¹¹⁴ The *Jarrell* court found significant the “lack of specificity of the warning in comparison to the nature of the harm.”¹¹⁵ That court held it was unreasonable for the manufacturer to rely on a third-party employer to warn ultimate users of the danger of its product when its ability to warn them directly of the significant harm was unrestricted.¹¹⁶

Consequently, the *Baker* court held that, “[u]nder some circumstances, Indiana law permits a manufacturer to discharge its duty to warn by relying upon a third party to warn ultimate users, such as where the purchaser of a product is a ‘knowledgeable and sophisticated bulk purchaser.’”¹¹⁷ The *Baker* court reviewed a number of significant Indiana cases permitting manufacturers to discharge their duty to warn by relying on third parties to determine whether Indiana courts would apply the knowledgeable, sophisticated bulk purchaser defense if they were presented with the issue.¹¹⁸ The court concluded:

[I]t is clear that where Indiana courts, and courts applying Indiana law, have found that a manufacturer’s duty to warn the ultimate user of the

110. *Id.* (citing *Burton v. L.O. Smith Foundry Prods.*, 529 F.2d 108, 111 (7th Cir. 1976) (applying Indiana law); *Hoffman v. E.W. Bliss, Co.*, 448 N.E.2d 277, 286 (Ind. 1993); *Shanks v. A.F.E. Indus.*, 416 N.E.2d 833, 837-38 (Ind. 1981)). The court noted, however, that Indiana courts have never completely relieved the manufacturer of a duty to warn. *Id.* at 1147 n.1. In other words, a manufacturer may not delegate its duty to warn a third party in such a way that relieves it altogether of its duty.

111. *Id.* at 1149.

112. RESTATEMENT (SECOND) OF TORTS § 338 cmt. n (1965).

113. *Jarrell*, 528 N.E.2d at 1164 (quoting *Dougherty v. Hooker Chem. Corp.*, 540 F.2d 174, 179 (3d Cir. 1976)).

114. *Id.* at 1162-63.

115. *Id.* at 1163.

116. *Id.* at 1164.

117. *Baker*, 962 F. Supp. at 1149.

118. *Id.* at 1149-51.

harms associated with that product may be discharged by relying on a third party, they have emphasized the third party's knowledge, control over the environment in which the product is used, and the extent to which the manufacturer could have labeled the product to warn of the danger. These are all considerations invoked in the "knowledgeable and sophisticated bulk purchaser" defense.¹¹⁹

The court considered it logical to hold that an Indiana court would apply the knowledgeable, sophisticated bulk purchaser defense, if it were given the opportunity.¹²⁰

Nevertheless, the *Baker* court declined to hold that the manufacturer's reliance on a knowledgeable, sophisticated bulk purchaser would automatically insulate the manufacturer from liability.¹²¹ Instead of considering the exception as an absolute bar to liability under all circumstances, the court noted that the balancing of factors required under the defense necessarily would involve an examination of each case on its own terms.¹²²

The *Baker* plaintiffs' employer was considered a knowledgeable and sophisticated purchaser of the PCB products.¹²³ It had long standing and extensive knowledge of the dangers associated with the products.¹²⁴ It supplied detailed specifications for the products; developed similar products after years of conducting its own research; and maintained medical, engineering, and environmental departments dedicated to exploring the effects of the products.¹²⁵ Furthermore, the plaintiffs' employer was considered to be in a superior position to assess the hazards and to determine the safeguards for the employees handling the products.¹²⁶ The PCBs were delivered in railroad cars, tank trucks, and fifty-five gallon drums.¹²⁷ There was no way for the product to be labeled directly. Furthermore, it was impossible for the manufacturer to anticipate and to access all of the employees who would come into contact with its products.¹²⁸ The plaintiffs' employer, therefore, was considered to be a sophisticated and knowledgeable bulk purchaser.¹²⁹ Based on these facts, the district court granted the defendant's motion for summary judgment on the plaintiffs' claim for failure to warn.¹³⁰

119. *Id.* at 1150.

120. *Id.* at 1151.

121. *Id.*

122. *Id.* at 1151-52.

123. *Id.* at 1152.

124. *Id.*

125. *Id.*

126. *Id.* at 1153.

127. *Id.*

128. *Id.*

129. *Id.* at 1156.

130. *Id.* at 1161.

B. Statute of Repose

In *Johnson v. Kempler Industries, Inc.*,¹³¹ the court addressed Indiana's statute of repose for product liability actions and the question of when the statute commences to run.¹³² The court reiterated the well-established principle that the statute of repose begins to run upon the delivery of a product to the initial user or consumer.¹³³ "The defects to which the statute applies are those present at the time [the product] is conveyed by the seller to another party."¹³⁴ In general, any party who was an essential part of the stream of commerce that resulted in the delivery of the product to the initial user or consumer may claim the statute of repose defense.¹³⁵ However, if the action is based upon a defect that did not exist at the time of delivery to the initial user, no party may assert the statute of repose as a defense.¹³⁶ Actions involving post-sale or post-initial-delivery negligence are not subject to the ten-year statute of repose, which begins to run at the time of delivery.¹³⁷

In *Johnson*, the plaintiff argued that the rebuilding or reconditioning of the subject machinery commenced a statute of repose period.¹³⁸ The seller of the machinery in *Johnson* had resold a shear that was originally manufactured in 1963. Before resale, the defendant installed a guard on the shear and affixed a warning label to it. The Indiana Court of Appeals reviewed *Denu v. Western Gear Corp.*¹³⁹ in which the District Court for the Southern District of Indiana determined that Indiana's statute of repose would recommence "when a product has been reconditioned, altered, or modified to the extent that a new product has been introduced into the stream of commerce."¹⁴⁰ Nonetheless, the *Johnson* court concluded that the plaintiff was mischaracterizing the alterations made to the product in question.¹⁴¹ According to the court, the product "never underwent any substantial overhaul or reconditioning."¹⁴² While the Indiana Court of Appeals did not adopt the holding of *Denu*, the opinion suggests that the statute of repose might recommence upon a substantial overhaul or reconditioning of a ten-year-old product.

The plaintiff next argued that the statute of repose should be extended because the safety guard and warning label were defective. Relying on the

131. 677 N.E.2d 531 (Ind. Ct. App. 1997).

132. *Id.* at 536 (ruling on IND. CODE § 33-1-1.5-5 (1993)).

133. *Id.* (citing *Stump v. Indiana Equip. Co.*, 601 N.E.2d 398, 401 (Ind. Ct. App. 1992)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. 581 F. Supp. 7 (S.D. Ind. 1983).

140. *Johnson*, 677 N.E.2d at 536-37 (citing *Denu*, 581 F. Supp. at 8).

141. *Id.* at 537.

142. *Id.*

Seventh Circuit's decision in *Black v. Henry Pratt Co.*,¹⁴³ the *Johnson* court adopted the rule that liability can be imposed on the manufacturer of a product's component where the component was in fact defective and was the cause of the injury.¹⁴⁴ The *Johnson* court resolved this issue in favor of the defendant by finding that the safety guard and warning labels were not defective.¹⁴⁵

This decision confirms two fact scenarios for recommencing the ten-year statute of limitations under Indiana's Product Liability Statutes: (1) reconditioning or substantially overhauling an old product, and (2) adding defective components or warnings to an old product.

In *McIntosh v. Melroe Co.*,¹⁴⁶ the Indiana Court of Appeals was asked to consider a constitutional challenge to Indiana's ten-year statute of repose under the Product Liability Act. The plaintiff complained that the statute of repose denied him a remedy by due course of law as guaranteed by the Indiana Constitution.¹⁴⁷ The plaintiff argued that the right to recover for tortious injuries has existed in common law for centuries, that the statute of repose impermissively stripped him of this right, and that the framers of the Indiana Constitution did not intend to grant the general assembly the power to limit the common law right to recover for injuries in tort.¹⁴⁸ In rejecting these arguments, the *McIntosh* court found the Indiana Supreme Court's decision in *Dague v. Piper Aircraft Corp.*¹⁴⁹ to be controlling. In *Dague*, the Indiana Supreme Court addressed identical arguments and found that the state of repose did not violate the Indiana Constitution as a whole.¹⁵⁰

The plaintiff further argued that the statute of repose violates the Indiana Constitution¹⁵¹ because it grants a special privilege and imposes a special burden upon two sets of individual classes. First, the plaintiff argued that "the statute only applies to manufacturers of durable goods because only durable goods remain in use long enough to satisfy the ten-year statute of repose."¹⁵² Thus, section 23 "denies the privilege of immunity to non-durable goods manufacturers."¹⁵³ Second, the plaintiff argued that the statute of repose creates

143. 778 F.2d 1278 (7th Cir. 1985).

144. *Johnson*, 677 N.E.2d at 537.

145. *Id.* at 538.

146. 682 N.E.2d 822 (Ind. Ct. App. 1997).

147. IND. CONST. art. I, § 12. "All courts shall be open; and every person, for injury done to him in his person, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." *Id.*

148. *McIntosh*, 682 N.E.2d at 824-25.

149. 418 N.E.2d 207 (Ind. 1981).

150. *McIntosh*, 682 N.E.2d at 825 (citing *Dague*, 418 N.E.2d at 213).

151. IND. CONST. art. 1, § 23. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." *Id.*

152. *McIntosh*, 682 N.E.2d at 825.

153. *Id.*

two classes of victims: tort victims injured by products less than ten years old, and tort victims injured by products more than ten years old.¹⁵⁴

The court analyzed the plaintiff's arguments by applying the two-pronged test for challenges under article 1, section 23 of the Indiana Constitution as set forth in *Collins v. Day*:¹⁵⁵ (1) whether the disparate treatment accorded by the legislation is reasonably related to inherent characteristics which distinguish the unequally treated classes, and (2) whether the preferential treatment is uniformly applicable and equally available to all persons similarly situated.¹⁵⁶ The court stated that, before these tests can be applied, "the statute must grant unequal privileges or immunities to differing classes of persons."¹⁵⁷ The statute applies equally to all manufacturers; therefore, the plaintiff's claim that the statute of repose creates different classes of manufacturers did not pass the threshold.¹⁵⁸ For example, if a non-durable good survived to be consumed or used more than ten years after it was first delivered, the statute of repose would apply to ban a product liability action¹⁵⁹

The court agreed that the statute treats classes of tort victims differently, but, applying the *Collins* test, found that the disparate treatment was reasonably related to the inherent characteristic which distinguishes the two classes: the age of the product.¹⁶⁰ The age of the product created the costs and dangers the Indiana General Assembly sought to avoid by enacting the statute.¹⁶¹ The second prong of the *Collins* test was also satisfied because the statute of repose applies equally to all persons within a class of tort victims.¹⁶²

154. *Id.*

155. 644 N.E.2d 72, 80 (Ind. 1994).

156. *McIntosh*, 682 N.E.2d at 826.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 826-27.

162. *Id.* at 827.

SURVEY OF 1997 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

INTRODUCTION

As in years past, the Indiana Supreme Court has made profound changes in the professional responsibility landscape. The court has demonstrated an intense interest in raising the ethics level of the entire bar. Historically, the supreme court has spoken primarily through its opinions in disciplinary cases and, where appropriate, cases within both civil and criminal law.¹ In recent years, however, the supreme court has used its rule-making authority to make profound changes associated with the practice of law. To be sure, the court is as productive of disciplinary opinions as it has been in the past. Although the court has been very active during the survey period, this work will address three of the more remarkable changes to the rules regulating the practice of law. Thereafter, recent cases of note will be illuminated.

I. THE RULES

Almost twenty years ago, in *In re Perrello*,² the Indiana Supreme Court addressed the novel issue of whether the practice of law could be divided into two segments—a “practice” side and a “business” side.³ This 1979 case was a published decision in which the court exercised its rarely used power to find a lawyer in contempt of the supreme court for continuing to practice law while suspended. The *Perrello* decision left little doubt that the supreme court needed no expert opinion to decide whether its authority to regulate the practice of law was plenary.

Respondent attempted to call four witnesses which he qualified as experts in the area of professional responsibility by reason of their being practicing attorneys or law school professors. It was indicated by the Defendant that these witnesses would testify that there are two distinct areas in the practice of law: the practice end and the business end of handling a law practice. Respondent further indicated that the witnesses would testify that the business end of the practice was not the practice of law as contemplated in the suspension order. The testimony of these witnesses was excluded by the Court on the ground that it invaded the

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1. For example, in *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165 (Ind. 1996), the supreme court examined issues of attorney-client privilege and work-product privilege in the situation where a party hires the former employee of an adverse party to provide an expert opinion.

2. 386 N.E.2d 174 (Ind. 1979).

3. *See id.* at 179.

province of the Court. It is the province of this Court to determine what the practice of law is, and the opinions of experts on the subject are not proper evidence. We might say however, that we do not recognize a division of the practice of law into a practice side and a business side. To manage any profession, there are incidental business elements that are a part of the total process. The performing of these business processes are a part of the total process and certainly cannot be separated and isolated from the total transaction. The conducting of the business management of a law practice, in conjunction with that practice, constitutes the practice of law.⁴

The rule changes created by the supreme court in late 1997 not only make important changes in the ethics landscape for Indiana lawyers, but also govern what might be regarded as exclusively the business aspects of the practice of law.

A. Interest on Lawyers Trust Accounts

Indiana joined the ranks of every other state in creating rules aimed at making client funds productive of interest for the public benefit. The interest thus collected will be turned over to the Indiana Bar Foundation. Under the Foundation's stewardship, the funds collected will then be used for legal projects designed to benefit the public.

1. *History.*—The concept of using interest on lawyers' trust accounts (IOLTA) for public service projects has been around for more than two decades. The basic idea is that the state should be the beneficiary of the interest earned by client funds in the trust account where, even though the funds are pooled with the funds of others, the amount of an individual client's funds can be considered nominal or held for such a brief period of time that the amount of interest earned is below the cost of subaccounting to each client. It has been the root of a popular myth in professional responsibility for many years that funds held in trust cannot be held at interest. This never was, in fact, a proscription under the Rules of Professional Conduct or the former Code of Professional Responsibility. The problem with holding client funds at interest stemmed from the duty to subaccount for the interest and pay it over to each client. Where the total sum for an individual client was nominal or not held for a long period of time, the lawyer did not cause his account to bear interest. Any money earned from those funds was made by the financial institution in which they were deposited.

Florida was the first state to change the practice and lay claim to the interest earned on pooled funds trust accounts.⁵ Since Florida's action in 1978, every other state (and the District of Columbia) has adopted a program whereby the IOLTA funds are collected by the state for use in programs for the support of law-related public service activities.⁶ These services center primarily around the

4. *Id.* at 178-79.

5. See *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978).

6. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 45:201 (1994).

direct delivery of legal services to the poor.⁷ With the most recent rule changes, Indiana became the last jurisdiction to adopt such a program.⁸

Through the years, three specific types of IOLTA regulations have developed. The first is described as "mandatory" in which all lawyers who hold funds for others must participate.⁹ The second variety is the "voluntary" system in which a lawyer must expressly notify the state's supreme court and his or her own financial institution regarding their intent to participate in the state's IOLTA program.¹⁰ The third type of program is described as the "opt-out" system.¹¹ Under the "opt-out" system, all affected lawyers are required to participate in the program unless they explicitly "opt-out" from participation.¹² As of 1997, twenty-seven jurisdictions had adopted mandatory IOLTA programs, twenty jurisdictions, including Indiana, had adopted opt-out programs, and only four jurisdictions maintained programs of voluntary participation.¹³

2. *Uses by the States.*—As a general rule, the states have used the monies gathered from their IOLTA programs for purposes dedicated to public service practice. For example, most states have earmarked these funds for use in providing legal services directly to the disadvantaged in civil representation. States have also used these funds for providing education to the public about lawyers and the delivery of legal services.¹⁴ Some states, however, have dedicated IOLTA money to defraying the costs of litigation associated with improving the bar and paying for lobbying activities by the state's bar association.¹⁵ The Michigan and South Dakota Supreme Courts use the funds not only for the traditional uses, but also to pay the public costs of representations by public defenders in criminal cases. The Michigan approach aside, the states have not used IOLTA money for the expenses directly attributable to the operation of the courts or bar associations except for those directly attributable to tracking and obtaining IOLTA funds.¹⁶

3. *The Indiana Formulation.*—The Indiana Supreme Court's approach physically places the rule as an amendment to Rule 1.15 of the Indiana Rules of Professional Conduct.¹⁷ The existing portion of this rule defined the lawyer's duties associated with safekeeping funds and property belonging to clients or third persons. The supreme court requires, opt-out provisions aside, that "a

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The ABA/BNA survey also points out that 17 states which originally started as voluntary or opt-out type programs have converted to mandatory compliance over the last 10 years.

14. *Id.*

15. See *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993).

16. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 45:201 (1994).

17. Rule 1.15 was amended February 1, 1998.

lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time (hereinafter sometimes referred to as an 'IOLTA account') in compliance with the following provisions"¹⁸ Those requirements include a prohibition against any of the earnings from an IOLTA account becoming available to the lawyer or law firm.¹⁹ The dedicated IOLTA account must include *all* clients' funds which are nominal in amount or held for a short time.²⁰ The account can be maintained at any financial institution which has been approved by the Disciplinary Commission.²¹ The supreme court also requires that the funds in an IOLTA account must be subject to withdrawal upon request and without delay or risk to the principal amount.²² Lawyers and law firms who participate in the IOLTA program must direct their financial institution to remit all the proceeds from the account to the Indiana Bar Foundation no less than every three months.²³ The financial institution also has a duty to identify the lawyer or law firm from which the money is received.²⁴ Other ancillary duties associated with statements and bank charges are spelled out in the rule as well.

In an effort to keep the IOLTA program cost-effective, the rule also explicitly provides:

Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.²⁵

The burden of good stewardship of the IOLTA funds is clearly on the Indiana Bar Foundation.²⁶ Oversight of these monies, however, is still in the province of the Indiana Supreme Court.²⁷ The supreme court requires the Foundation to prepare a plan for investment and distribution of the funds and submit it for approval by the court.²⁸ Approval of the Foundation's plan must be obtained on,

18. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d) (1998). Rule 1.15 is attached as Appendix A.

19. *Id.*

20. *Id.*

21. IND. ADMIS. & DISC. R. 23, § 29 (1997).

22. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(3) (1998).

23. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(5) (1998).

24. *Id.*

25. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(6) (1998).

26. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(8) (1998).

27. *Id.*

28. *Id.*

at least, an annual basis.²⁹ In fact, the Foundation must provide a financial statement of its revenues and expenditures to the court every year.³⁰ In addition, a summary of this financial statement will be published in the statewide legal publications.³¹

As might be expected, the financial institutions holding these accounts have a complex record keeping task. They must track and account for the interest drawn off the trust account for each lawyer and law firm participating in the IOLTA program.³² The institution must send these funds to the Foundation.³³ The institution can elect when to pay that interest over to the Foundation, but those remittances must be made no less than quarterly.³⁴ The rule permits the institution to make its remittances to the Foundation in a lump sum. The institution, however, must provide periodic statements to the lawyer or law firm including the average account balance, the amount of interest earned and remitted and the rate of interest applied to the funds. Similar information must be supplied to the Foundation with each remittance reporting the specific amounts attributable to specific lawyers or law firms.³⁵ Provision is made, however to ensure that the information provided to the Foundation is kept confidential.³⁶ The use of the information includes data compilations by the Foundation.³⁷

Finally, Rule 1.15 provides that the money received by the Indiana Bar Foundation is to be used not only for the administration of the IOLTA program, but to assist (as well as establish) *pro bono publico* programs as well as other programs for the benefit of the public.³⁸

4. *Pro Bono Publico Activities.*—Indiana's first version of the Rules of Professional Conduct became effective on January 1, 1987. That version included rules 6.1 through 6.4 governing *pro bono publico* service by lawyers. From the time they were adopted in Indiana until this survey period, the rules governing *pro bono* service were unchanged. In fact, these rules and their attendant Comments were adopted unchanged from the ABA's Model Rules of Professional Conduct.³⁹

Effective February 1, 1998, Indiana has included a new rule in the public service section of the rules. The purposes of the new rule are spelled out in its opening section:

The purpose of this voluntary attorney pro bono plan is to promote equal

29. *Id.*

30. *Id.*

31. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(i)(4) (1998).

32. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(5)(A) (1998).

33. *Id.*

34. *Id.*

35. *Id.*

36. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(9) (1998).

37. *Id.*

38. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d)(8) (1998).

39. MODEL RULES OF PROFESSIONAL CONDUCT Rules 6.1-6.4 (1996).

access to justice for all Indiana residents, regardless of economic status, by creating and promoting opportunities for attorneys to provide pro bono civil legal services to persons of limited means, as determined by each district pro bono committee. The voluntary pro bono attorney plan has the following goals:

- (1) To enable Indiana attorneys to discharge their professional responsibilities to provide pro bono services.
- (2) To improve the overall delivery of civil legal services to persons of limited means by facilitating the integration and coordination of services provided by pro bono organizations and other legal assistance organizations throughout the state of Indiana.
- (3) To ensure statewide access to high quality and timely pro bono civil legal services for persons of limited means by (i) fostering the development of new pro bono programs where needed and (ii) supporting and improving the quality of existing pro bono programs.
- (4) To foster the growth of a public service culture within the Indiana Bar which values pro bono publico service.
- (5) To promote the ongoing development of financial and other resources for pro bono organizations in Indiana.⁴⁰

To achieve the rather ambitious ends of the program, the supreme court created the Indiana Pro Bono Commission. This twenty-one member Commission is made up of lawyers and judges from a wide spectrum of the bench and bar.⁴¹ The supreme court appoints eleven members and the President of the Indiana Bar Foundation appoints the remaining ten.⁴² The Chair of the Commission is then selected from among its members by the Indiana Supreme Court.⁴³ The Commission itself is intended to operate as a program within the Foundation and it performs those tasks delegated to it by the Foundation.⁴⁴ The rule also mandates that district *pro bono* committees shall be created in each of the fourteen judicial districts in the state.⁴⁵ These districts were created several years ago and a list is attached as Appendix B.⁴⁶

A judge in each judicial district will preside over the district's *pro bono* committee and the committee will be composed of anywhere from four to eight

40. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(a) (1998).

41. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(b) (1998).

42. *Id.*

43. *Id.*

44. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(d) (1998).

45. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(f) (1998).

46. The districts are identified in Rule 3(A) of the Indiana Administrative Rules.

people. Their work will include creating and executing district, and even county, *pro bono* plans on an annual basis.⁴⁷ They will also make annual reports to the statewide Commission.⁴⁸ The primary purpose of the district committees is to serve in the role as something of a clearinghouse to coordinate the *pro bono* activities and opportunities within the district.⁴⁹ This coordination encompasses intake and referral of clients, reimbursement for out-of-pocket expenses associated with the actual delivery of *pro bono* legal service, providing malpractice insurance and many other services.⁵⁰ In addition, the rule identifies more than a dozen ways in which *pro bono* services can be provided by members of the bar.⁵¹

5. *Exempt Lawyers and Opting Out.*—The IOLTA rules require that every lawyer must certify to the supreme court every year that all client funds which are nominal in amount or to be held for a short period of time by the lawyer or the lawyer's law firm are held in an IOLTA account.⁵² But what of government lawyers and others who have no trust accounts? Under subsections (e) and (f) of Rule 1.15, lawyers can notify the supreme court that they are either exempt from participating⁵³ or are opting out of participation in the IOLTA program.⁵⁴ A lawyer who voluntarily removes himself from the program must notify the supreme court.

A lawyer may elect to decline to maintain IOLTA accounts as described in paragraph (d) above for any calendar year by so notifying the Supreme Court in writing on or before October 1 of the previous year on a form prepared and promulgated by the Clerk of the Supreme Court. A lawyer who does not so advise the Supreme Court within any such period shall be required during the next calendar year to maintain all clients' funds which are nominal in amount or to be held for a short period of time in an IOLTA account.⁵⁵

During this survey period, the U.S. Supreme Court granted *certiorari* to a Texas case involving an IOLTA issue.⁵⁶ The primary issue is a holding by the

47. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(g) (1998).

48. *Id.*

49. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(h) (1998).

50. *Id.*

51. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 6.5(i) (1998).

52. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(e) (1998).

53. *Id.* (exempting lawyers not engaged in private practice, including government lawyers, judges, prosecutors (both state and federal) and corporate lawyers).

54. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(f) (1998) (allowing attorneys who are otherwise required to participate in the IOLTA program to voluntarily remove themselves from the program). Opting out, however, must be done on a form prescribed by the Clerk of the Supreme Court. *Id.*

55. *Id.*

56. Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996), *cert. granted sub nom.*, Phillips v. Washington Legal Found., 117 S. Ct. 2535 (1997).

Fifth U.S. Circuit Court of Appeals in which that court held that clients have an actual property interest in the funds created by pooled funds IOLTA accounts.⁵⁷ No decision had been made on this case at the time of this publication.

B. Sale of a Law Practice

The Model Rules of Professional Conduct and their attendant Comments were adopted by the House of Delegates of the American Bar Association in August 1983.⁵⁸ Since then, a vast majority of states have adopted some version of the Model Rules with variations from jurisdiction to jurisdiction. One model rule which did not receive universal acceptance was Rule 1.17. This rule was intended to address some difficult questions associated with the sale of a law practice like, for example, what happens to the firm's goodwill and what role, if any, do clients play in connection with the sale of a practice.⁵⁹

The Indiana Supreme Court adopted a version of Rule 1.17 which is similar to, but not identical to, the model rule.⁶⁰ Furthermore the supreme court did not adopt the Comment to the model rule, which they have done in other parts of the Rules of Professional Conduct. Although the Comments do not have the force and effect of law, they can provide valuable insight into the intent of the drafters of the model rules.⁶¹ The full text of the Indiana version of Rule 1.17 is attached to this work as Appendix C. Of particular relevance, however, is section (d) which provides:

A lawyer or law firm may sell or purchase a law practice, including goodwill, if the following conditions are satisfied:

....

(d) The client consents to the sale. If a client cannot be given notice or fails to respond to notice of the sale, the representation of that client may not be transferred to the purchaser.⁶²

Specifically, paragraph (d) is an Indiana formulation. Under the model rule, there is a subsection (c)(4) which does not exist in Indiana's version of the rule.⁶³ The subject matter covered by these provisions is one of the primary areas of debate over this rule. The question has been often asked, "What happens to the

57. *Id.*

58. LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 1:101 (1994).

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1995).

60. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1998).

61. See note on "Scope" of the INDIANA RULES OF PROFESSIONAL CONDUCT (1997) ("The Comment accompanying each rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.").

62. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1998).

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17(c)(4) (1994).

clients in the sale of a law firm?" Under Indiana's version of the rule, the client must affirmatively consent, as a condition precedent to the transfer of their file to the purchasing lawyer or law firm. Absent consent, the representation of that client (more specifically, the file) remains with the selling lawyer and cannot be transferred to the lawyer buying the practice.⁶⁴ This approach to the question of client consent is both clear and clearly opposed to the approach taken by the American Bar Association on this subject. Bear in mind that, in Indiana, client consent is a condition precedent to transferring any file from the seller to the buyer. The ABA version treats client consent as a subordinate issue under section (c)(4) of its version of the rule.⁶⁵ The ABA's rule provides:

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

....

(c) Actual written notice is given to each of the seller's clients regarding:

....

(4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.⁶⁶

The weakness in the ABA's version is its silence as to the client's wishes in the matter. It covers the situation well where the client cannot be found or will not respond. It is silent, however, on the question, "what happens if the client does get the notice and objects to the transfer?" It is, after all, the client's representation to control.⁶⁷ The drafters, apparently, were aware of this problem and their Comment to this portion of the rule has a decidedly defensive tone when explaining why the lawyer's right to sell outweighs the client's ability to control not only the course of the representation, but which lawyer is actually in possession of the file.

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an

64. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17(d) (1998).

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 (1994).

66. *Id.*

67. See INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) & cmt. (1997).

identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.⁶⁸

The ABA, therefore, contemplates that the answer to a lack of client consent is judicial intervention. No judicial paradigm is offered in the model rule or its Comment. That step in the chain is left for each state to determine. Also unanswered are questions associated with judicial intervention and *in camera* conferences with a judge who may be presiding over the cases each file represents. Should opposing counsel be present during some of these *in camera* meetings? Does the lawyer prejudice his (soon to be former) client's interests by revealing otherwise privileged information in an attempt to withdraw? If the judge in this circumstance is the presiding judge in the underlying representation, does the lawyer's *in camera* representations set up the client for a dismissal or default because of his or her unavailability? The ABA formulation shifts the problem of dealing with the client from the selling lawyer to the local judge.

Under the Indiana formulation, the lawyer who undertook the representation,

68. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17 cmts. 6-8 (1994).

perhaps even accepted fees associated with the case, remains responsible for dealing with the unavailable client.⁶⁹ This approach is not without its weaknesses as well. After all, under an earlier provision of the rule, one of the conditions precedent to using this rule is that, "the seller ceases to engage in the private practice of law" in the state of Indiana.⁷⁰ This can cause a hardship for the client who is searching for his file after a long absence only to discover that his lawyer has retired or moved to another state. Still the burden remains on the selling lawyer to help the client. Under the ABA formulation, the local judge relieves the lawyer of that obligation and orders the file transferred to a law firm which could be completely unknown to the client.⁷¹

In the end, lawyers who will be using this rule would be well advised to do their research with extreme care. Searching for precedent in other jurisdictions may lead to disaster. The researcher should first determine that the other jurisdiction has adopted language identical to that in Indiana. The researcher should also be cautious in relying on authority from other jurisdictions expecting to find useful language. Even the Comment to the model rule is of limited utility based upon the formulation of the rule as adopted by the Indiana Supreme Court.

C. Professional Corporations, Limited Liability Companies and Limited Liability Partnerships

As permitted in other jurisdictions, Indiana lawyers and law firms now have more options from which to choose when deciding which form of business association in which they wish to practice law. Heretofore, professional corporations (PC's) for lawyers and law firms were governed under Rule 27 of the Indiana Rules of Admission and Discipline.⁷² The rule itself has been amended repeatedly through the years.⁷³

In a decidedly modern move, the supreme court struck the language of the existing rule and adopted a new rule identifying not only PC's, but Limited Liability Companies (LLC's) and Limited Liability Partnerships (LLP's) as well.⁷⁴ Much of the new language is adapted from the former rule simply to accommodate the addition of the words "Limited Liability Company" and "Limited Liability Partnership" where only the words "Professional Corporation" existed before.⁷⁵ One new provision of the rule now mandates, "[t]he practice of

69. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17(d) (1998).

70. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.17(a) (1998).

71. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.17(c) & cmt. 7 (1996).

72. This rule was originally adopted by the Indiana Supreme Court on January 1, 1976.

73. Amendments to the rule occurred August 31, 1976, December 4, 1980, November 16, 1984, October 15, 1986 and September 13, 1991.

74. IND. ADMIS. & DISC. R. 27.

75. For example, section (c) of the new rule is a revamped version of section (e) of the former rule. In addition, where the former rule makes reference to the term "all shareholders," the new rule now provides, "[e]ach officer, director, shareholder, member, partner or other equity owner . . ."

law in Indiana as a professional corporation, limited liability company or limited liability partnership shall not relieve any lawyer of or diminish any obligation of a lawyer under the Rules of Professional Conduct or under these rules.”⁷⁶ This is consistent with the Indiana Supreme Court’s repeated emphasis on ethics and professional responsibility considerations when creating or amending its rules.⁷⁷

The core of the new rule is centered on the requirement that every professional corporation, limited liability company and limited liability partnership must maintain professional liability insurance at state prescribed levels. The supreme court explicitly cited Rule 5.1 of the Indiana Rules of Professional Conduct. This rule imposes certain responsibilities on supervisory lawyers to manage their subordinate lawyers. Under section (f) of Rule 27, the Indiana Supreme Court mandates:

Each officer, director, shareholder, member, partner or other equity owner of a professional corporation, limited liability company or limited liability partnership shall be liable for his or her own acts of fraud, defalcation or theft or errors or omissions committed in the course of rendering professional legal services as provided by law including, but not limited to, liability arising out of the acts of fraud, defalcation or theft or errors or omissions of another lawyer over whom such officer, director, shareholder, member, partner or other equity owner has supervisory responsibilities under Rule 5.1 of the Rules of Professional Conduct, without prejudice to any contractual or other right that the aggrieved party may be entitled to assert against a professional corporation, limited liability company, limited liability partnership, an insurance carrier, or other third party.⁷⁸

Lawyers who intend to do business in one of these forms of business associations must also maintain “adequate professional liability insurance.”⁷⁹ This is the first time there has been a state imposed requirement for any lawyer to maintain professional liability insurance. The full text of the new rule follows this work as Appendix D.

Finally, it appears that this rule has been carefully crafted to permit non-Indiana lawyers to participate under the new formulation of these business associations.⁸⁰

76. IND. ADMIS. & DISC. R. 27(e).

77. *See, e.g.*, IND. ADMIS. & DISC. R. 29 (amended to include an ethics component for each lawyer’s continuing legal education requirement).

78. IND. ADMIS. & DISC. R. 27(f).

79. IND. ADMIS. & DISC. R. 27(g).

80. Although no explicit statement to this effect is made, a good example of the wordsmithing used to create the rule can be found in Rule 27(i) of the Indiana Rules of Admission and Discipline:

Upon receipt of such application form and fees, the State Board of Law Examiners shall make an investigation of the professional corporation, limited liability company or limited liability partnership in regard to finding that all officers, directors, shareholders,

II. THE CASES

A. Alas, Diligence

Lawyers' failure to exercise good law practice management skills are a perennial source of disciplinary cases. Many of the decided cases deal with lawyers' lack of diligence and failure to communicate with their clients.⁸¹ As the supreme court often observes:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.⁸²

Year after year, this form of misconduct constitutes a substantial portion of the total number of disciplinary opinions handed down by the Indiana Supreme Court.

B. Unusual Misconduct

From the mundane to the sublime, a number of unusual cases were decided during this survey period in several different areas of law. These cases are unusual, at least as far as the factual bases behind the misconduct are concerned. The legal bases, as will be seen, are well established in the law governing the conduct of lawyers.

Avoiding conflicts of interest is a constant battle for many lawyers. Analyzing conflicts can be a very difficult process under most circumstances.⁸³

members, partners, other equity owners, managers of lawyer employees licensed to practice law in Indiana are each duly licensed to practice law in Indiana and that all hereinabove outlined elements of this Rule have been fully complied with, and the Clerk of the Supreme Court and Court of Appeals shall likewise certify this fact. . . . If it appears that no such disciplinary action is pending and that all officers, directors shareholders, members, partners, other equity owners managers of lawyer employees required to be are duly licensed to practice law in Indiana.

81. See, e.g., *In re Kehoe*, 678 N.E.2d 394 (Ind. 1997); *In re Roche*, 678 N.E.2d 797 (Ind. 1997); *In re Caputi*, 676 N.E.2d 1058 (Ind. 1997); *In re Putsey*, 675 N.E.2d 703 (Ind. 1997); *In re Cartmel*, 676 N.E.2d 1047 (Ind. 1997).

82. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1987).

83. For example, the case of *In re McCarthy*, 668 N.E.2d 256 (Ind. 1996), is one in which the lawyer handled a collection matter for an accountant. While still holding the accountant's funds in trust, the lawyer sued the accountant on behalf of another client. The lawyer was found to have violated Rule 1.7 of the Indiana Rules of Professional Conduct, which prohibits a lawyer from

In the case of *In re Dillon & Maternowski*,⁸⁴ the lawyers undertook the representation in federal district court of a young woman arrested at the Indianapolis International Airport with a suitcase full of cocaine. Respondents received their fees in large sums of cash from individuals identified only as "T" and "Moe."⁸⁵ Unsurprisingly, "T" and "Moe" never asked for receipts. It was assumed by the client and reasonably to be expected by the lawyers that the source of their fees was someone in the chain of drug distribution. Respondents, whose practice concentrated in the defense of drug cases, maintained a policy that they would not represent persons who cooperated with the government and would withdraw if the client elected to cooperate.⁸⁶ As the case progressed, the government tendered an offer of a reduced sentence in exchange for the woman's cooperation in identifying others in the drug distribution chain.⁸⁷ Whenever the client approached her lawyers about cooperating, the lawyers restated their policy against representing snitches and advised her of the disadvantages of cooperating, including endangerment to members of her family.⁸⁸ Ultimately, the client complained to the judge that her lawyers were preventing her from cooperating.⁸⁹ In suspending each lawyer for thirty days, the supreme court found:

[T]he findings indicate a reasonable possibility that [the client's] accomplices sought out the respondents and paid their fees for the very reason that under their established policy, the respondents would influence [the client] to not implicate the accomplices. Under such circumstances, a full disclosure required that the respondents discuss with [the client] the possibility that her attorneys' fees were being paid by her accomplices and that, if this were in fact true, disclose the conflict inherent in the representation. The convergence of the non-cooperation policy and the reasonable possibility that attorneys' fees were being paid by accomplices, impermissibly conflicted with the independence of the respondents' professional judgment.⁹⁰

In the case of *In re Levy*,⁹¹ the respondent lawyer had previously been suspended for two years after converting large sums of money from the estate of Ethel Parzen.⁹² The respondent was not disbarred in part because he demonstrated in that case that he had made full restitution to, and paid the attorney fees of, his victims, and because he submitted, and the hearing officer

undertaking a representation which is directly adverse to the interest of another client.

84. 674 N.E.2d 1287 (Ind. 1996).

85. *Id.* at 1288.

86. *Id.* at 1289.

87. *Id.*

88. *Id.* at 1289-90.

89. *Id.*

90. *Id.* at 1292.

91. 682 N.E.2d 490 (Ind. 1997).

92. This underlying case was also entitled *In re Levy*, 637 N.E.2d 795 (Ind. 1994).

accepted, that this was the only unethical conduct in which the respondent had engaged.⁹³

The 1997 case grew out of an earlier newspaper article in the *Gary Post-Tribune* in which it was reported that a certain physician in northwestern Indiana had been the subject of numerous medical malpractice judgments or settlements, one of which had been secured by the attorney on behalf of a client in 1988. The client in the medical malpractice case read the newspaper article and discovered a disparity between the amount of the reported settlement (\$344,944) and the gross amount of the settlement communicated to her by the attorney (\$120,000).⁹⁴ The attorney had used the difference between the actual settlement and the misrepresented settlement to make restitution in the Parzen matter in his previous disciplinary action.⁹⁵ The attorney was charged with misconduct and, as a result of these facts, subsequently tendered his resignation from the bar to the supreme court.⁹⁶

In the case of *In re Tracy*,⁹⁷ the respondent lawyer was licensed in Indiana, but practiced federal immigration law in California. He was not a member of the California bar. In 1987, the lawyer filed an affidavit with the Clerk of the Indiana Supreme Court exempting himself from payment of his annual registration fees and continuing legal education requirements. In the affidavit, he also asserted that he did not hold judicial office and was not engaged in the practice of law in Indiana.⁹⁸ Under the rules governing practice before the Immigration and Naturalization Service (INS), an attorney must be in good standing with the highest court of some state as a condition precedent to entering an appearance in an INS proceeding.⁹⁹ The respondent lawyer relied on his inactive Indiana license to support his appearances before the INS.¹⁰⁰ In addition, he used a regular checking account, not a dedicated trust account, to deposit his clients' checks for filing fees for INS proceedings.¹⁰¹ Between October 1990 and August 1991, the lawyer wrote eleven checks to the INS that were returned due to insufficient funds.¹⁰² Although the lawyer reported to the Disciplinary Commission that he made all the dishonored checks good, this representation was false.¹⁰³ As a result, the lawyer received a six month suspension from the practice of law. The Indiana Supreme Court found the respondent failed to keep

93. *Id.* at 799.

94. *In re Levy*, 682 N.E.2d at 490.

95. *Id.* at 490-91.

96. Registration is tendered pursuant to Rule 23(17) of the Indiana Rules of Admission and Discipline.

97. 676 N.E.2d 738 (Ind. 1997).

98. *Id.* at 738. The standard terms of the affidavit can be found in ADMIS. & DISC. R. 23 § 21.

99. 8 C.F.R. §§ 1.1(f) & 292.1 (1997).

100. *In re Tracy*, 676 N.E.2d at 738.

101. *Id.*

102. *Id.*

103. *Id.*

client funds separate from his own money and thereby violated Rule 1.15(a) of the Indiana Rules of Professional Conduct.¹⁰⁴ The supreme court also found that the lawyer violated Rule 8.1(a) by making a misrepresentation to the Disciplinary Commission.¹⁰⁵ Finally, the court found that the lawyer committed, or attempted to commit a criminal action (i.e. conversion) and thereby violated Rules 8.4(a) and (b).¹⁰⁶

Of particular interest to lawyers who practice in probate and related areas is the case of *In re Woolbert*.¹⁰⁷ In *Woolbert*, the respondent lawyer was a dual fiduciary by serving as both the attorney for a supervised estate and as co-personal representative.¹⁰⁸ During the four years that the estate was open, the respondent and his co-executor withdrew \$80,000 from the estate without seeking court approval. Of this amount, \$35,000 went to the respondent lawyer, a similar amount went to the co-executor and \$10,000 was paid out as a loan to a third party.¹⁰⁹ The fees were reported for the first time on the final accounting the lawyer submitted to the court. The accounting was challenged and the lawyer's fees were reduced from \$35,000 to \$14,500.¹¹⁰ In finding that the lawyer had committed professional misconduct, the Indiana Supreme Court noted that Indiana law prohibits the withdrawal of fees from the supervised

104. That rule provides:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation. A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.15(a) (1998).

105. *In re Tracy*, 676 N.E.2d at 739. Rule 8.1 of the Indiana Rules of Professional Conduct requires, “[a]n applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact . . .”

106. *In re Tracy*, 676 N.E.2d at 739. In relevant part, Rule 8.4 of the Indiana Rules of Professional Conduct provides:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rule of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

107. 672 N.E.2d 412 (Ind. 1996).

108. *Id.*

109. *Id.* at 414.

110. *Id.*

administration of an estate without specific application to, and approval by, the probate court.¹¹¹ It did not matter to the court that no local rule restated this statutory requirement. The supreme court further likened the lawyer's state of mind to, at best, gross disregard for his fiduciary duty.¹¹² As with the *Tracy* case, the lawyer's misconduct included violations of Rules 1.15(a) and 8.4(b).¹¹³ The court also held the lawyer's conduct constituted dishonesty and misrepresentation, violating Rule 8.4(c) and conduct prejudicial to the administration of justice, violating Rule 8.4(d). For his misconduct, the lawyer was suspended from the bar and could not petition for reinstatement earlier than one year after the date of the suspension.¹¹⁴

CONCLUSION

During the period covered by this work, the Indiana Supreme Court made significant changes to the law governing the profession. The lion's share of these changes tended to modernize the operation of the Indiana bar in keeping with changes found elsewhere in the United States. Among the new rules are those creating a program for collecting and using the money developed from the interest on lawyer's trust accounts, for selling a law practice and transferring its files and for regulating the form of associations under which lawyers and law firms do business. This latter rule also includes, for the first time, that lawyers practicing in one of those forms must maintain adequate professional liability insurance or an acceptable substitute.

Decided cases, meanwhile, are always an important mechanism by which the supreme court instructs the bar on acceptable and unacceptable standards of conduct for lawyers. This period was no less active in judicial pronouncements than any other and, there is no reason to believe that the law in this area will remain static.

111. IND. CODE § 29-1-10-13 (1979).

112. *In re Woolbert*, 672 N.E.2d at 416.

113. *Supra* notes 103 and 104. The conduct in this case also violated Rule 3.4(c) of the Indiana Rules of Professional Conduct.

114. *In re Woolbert*, 672 N.E.2d at 416.

APPENDIX "A"
RULES OF PROFESSIONAL CONDUCT
Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation. A lawyer may deposit his or her own funds reasonably sufficient to maintain a nominal balance.

(b) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) Except as provided in paragraph (e) of this rule, a lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time (hereinafter sometimes referred to as an "IOLTA account") in compliance with the following provisions:

- (1) No earnings from such an IOLTA account shall be made available to a lawyer or law firm.
- (2) The IOLTA account shall include all clients' funds which are nominal in amount or to be held for a short period of time.
- (3) An IOLTA account may be established with any financial institution (i) authorized by federal or state law to do business in Indiana, (ii) insured by the Federal Deposit Insurance Corporation or its equivalent, and (iii) approved as a depository for trust accounts pursuant to Indiana Admission and Discipline Rules, Rule 23, Section 29. Funds in each IOLTA account shall be subject to withdrawal upon request and without delay and without risk to principal by reason of said withdrawal.
- (4) The rate of interest payable on any IOLTA account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors using accounts of the same class within the institution. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the funds which otherwise qualify to be placed in an

IOLTA account so long as there is no impairment of the right to immediate withdrawal or transfer of principal (except that accounts generally may be subject to statutory notification requirements) even though interest may be sacrificed thereby, provided all interest earned net of fees or charges is remitted to the Indiana Bar Foundation (the "Foundation"), which is designated in paragraph (i) of this rule to organize and administer the IOLTA program, and the depository institution submits reports thereon as set forth below.

(5) Lawyers or law firms depositing client funds in an IOLTA account established pursuant to this rule shall, on forms approved by the Foundation, direct the depository institution:

(A) to remit all interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, solely to the Foundation. The depository institution may remit the interest or dividends on all of its IOLTA accounts in a lump sum; however, the depository institution must provide, for each individual IOLTA account, the information to the lawyer or law firm and to the Foundation required by subparagraphs (d)(5)(B) and (d)(5)(C) of this rule;

(B) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and such other information as is reasonably required by the Foundation;

(C) to transmit to the depositing lawyer or law firm a periodic account statement for the IOLTA account reflecting the amount of interest paid to the Foundation, the rate of interest applied, the average account balance for the period for which the interest was earned, and such other information as is reasonably required by the Foundation; and

(D) to waive any reasonable service charge that exceeds the interest earned on any IOLTA account during a reporting period ("excess charge"), or bill the excess charge to the Foundation.

(6) Any IOLTA account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.

(7) In the event that any client asserts a claim against an attorney based upon such attorney's determination to place client funds in an IOLTA account because such balance is nominal in amount or will be held for a short period of time, the Foundation shall, upon written request by such

attorney, review such claim and either:

- (A) approve such claim (if such balances are found not to be nominal in amount or short in duration) and remit directly to the claimant any sum of interest remitted to the Foundation on account of such funds; or
- (B) reject such claim (if such balances are found to be sufficiently nominal in amount or short in duration) and advise the claimant in writing of the grounds therefor. In the event of any subsequent litigation involving such a claim, the Foundation shall interplead any such sum of interest and shall assume the defense of the action.

(8) All interest transmitted to the Foundation shall be held, invested and distributed periodically in accordance with a plan of distribution which shall be prepared by the Foundation and approved at least annually by the Supreme Court of Indiana, for the following purposes:

- (A) to pay or provide for all costs, expenses and fees associated with the administration of the IOLTA program;
- (B) to establish appropriate reserves;
- (C) to assist or establish approved pro bono programs as provided in Ind. Prof. Cond. R. 6.5;
- (D) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

(9) The information contained in the statements forwarded to the Foundation under subparagraph (d)(5) of this rule shall remain confidential and the provisions of Ind. Prof. Cond. R. 1.6 (Confidentiality of Information), are not hereby abrogated; therefore, the Foundation shall not release any information contained in any such statement other than as a compilation of data from such statements, except as directed in writing by the Supreme Court.

(10) The Foundation shall have full authority to and shall, from time to time, prepare and submit to the Supreme Court for approval, forms, procedures, instructions and guidelines necessary and appropriate to implement the provisions set forth in this rule and, after approval thereof by the Court, shall promulgate same.

(e) Every lawyer admitted to practice in this State shall annually certify to this Court, pursuant to Ind. Admis. Disc. R. 23(21), that all client funds which are nominal in amount or to be held for a short period of time by the lawyer or the lawyer's law firm are held in an IOLTA account, or that the lawyer is exempt because:

- (1) the lawyer or law firm's client trust account has been exempted and removed from the IOLTA program by the Foundation pursuant to subparagraph (d)(6) of this rule; or
- (2) the lawyer elected to decline to maintain an IOLTA account in accordance with the procedures set forth in paragraph (f) below; or
- (3) the lawyer:
 - (A) is not engaged in the private practice of law;
 - (B) does not have an office within the State of Indiana;

(C) is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

(D) is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law; or

(E) has been exempted by an order of general or special application of this Court which is cited in the certification.

(f) A lawyer may elect to decline to maintain IOLTA accounts as described in paragraph (d) above for any calendar year by so notifying the Supreme Court in writing on or before October 1 of the previous year on a form prepared and promulgated by the Clerk of the Supreme Court. A lawyer who does not so advise the Supreme Court within any such period shall be required during the next calendar year to maintain all clients' funds which are nominal in amount or to be held for a short period of time in an IOLTA account.

(g) A lawyer or law firm may establish a separate interest-bearing trust account for clients' funds which are neither nominal in amount nor to be held for a short period of time for a particular client or client's matter. All of the interest on such account, net of any transaction costs, shall be paid to the client, and no earnings from such account shall be made available to a lawyer or law firm.

(h) In the exercise of a lawyer's good faith judgment in determining whether funds of a client are of such nominal amount or are expected to be held for a short period of time, that a lawyer shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures; and

(3) the nature of the transaction(s) involved.

The determination of whether a client's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(i) The Foundation is hereby designated as the entity to organize and administer the IOLTA program established by paragraph (d) of this rule in accordance with the following provisions:

(1) The Board of Directors of the Foundation (the "Board") shall have general supervisory authority over the administration of the IOLTA program, subject to the continuing jurisdiction of the Supreme Court.

(2) The Board shall receive the net earnings from IOLTA accounts established in accordance with paragraph (d) of this rule and shall make appropriate temporary investments of IOLTA program funds pending disbursement of such funds.

(3) The Board shall, by grants, appropriations and other appropriate measures, make disbursements from the IOLTA program funds, including current and accumulated net earnings, in accordance with the

plan of distribution approved by the Supreme Court from time to time referenced in subparagraph (d)(8) of this rule.

(4) The Board shall maintain proper records of all IOLTA program receipts and disbursements, which records shall be audited or reviewed annually by a certified public accountant selected by the Board. The Board shall annually cause to be presented to the Supreme Court a reviewed or audited financial statement of its IOLTA program receipts and expenditures for the prior year. The report shall not identify any clients of lawyers or law firms or reveal confidential information. The statement shall be filed with the Clerk of the Supreme Court and a summary thereof shall be published in the next available issue of one or more state-wide publications for attorneys, such as *Res Gestae* and *The Indiana Lawyer*.

(5) The president and other members of the Board shall administer the IOLTA program without compensation, but may be reimbursed for their reasonable and necessary expenses incurred in the performance of their duties, and shall be indemnified by the Foundation against any liability or expense arising directly or indirectly out of the good faith performance of their duties.

(6) In the event the IOLTA program or its administration by the Foundation is terminated, all assets of the IOLTA program, including any program funds then on hand, shall be transferred in accordance with the Order of the Supreme Court terminating the IOLTA program or its administration by the Foundation; provided, such transfer shall be to an entity which will not violate the requirements the Foundation must observe regarding transfer of its assets in order to retain its tax-exempt status under the Internal Revenue Code of 1986, as amended, or similar future provisions of law.

APPENDIX "B"**ADMINISTRATIVE RULE 3.
COURT DISTRICTS**

(A) The state of Indiana is hereby divided into fourteen (14) administrative districts as follows:

- (1) District 1, consisting of the counties of Lake, Porter, LaPorte Starke, Pulaski, Jasper, and Newton;
- (2) District 2, consisting of the counties of St. Joseph, Elkhart, Marshall, and Kosciusko;
- (3) District 3, consisting of the counties of LaGrange, Adams, Allen, DeKalb, Huntington, Noble, Stueben, Wells, and Whitley;
- (4) District 4, consisting of the counties of Clinton, Fountain, Montgomery, Tippecanoe, Warren, Benton, Carroll, and White;
- (5) District 5, consisting of the counties of Cass, Fulton, Howard, Miami, Tipton, and Wabash;
- (6) District 6, consisting of the counties of Blackford, Delaware, Grant, Henry, Jay, Madison, and Randolph;
- (7) District 7, consisting of the counties of Clay, Parke, Putnam, Sullivan, Vermillion, and Vigo;
- (8) District 8, consisting of the counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan and Shelby;
- (9) District 9, consisting of the counties of Fayette, Franklin, Rush, Union, and Wayne;
- (10) District 10, consisting of the counties of Greene, Lawrence, Monroe and Owen;
- (11) District 11, consisting of the counties of Bartholomew, Brown, Decatur, Jackson, and Jennings;
- (12) District 12, consisting of the counties of Dearborn, Jefferson, Ohio, Ripley, and Switzerland;
- (13) District 13, consisting of the counties of Daviess, Dubois, Gibson, Knox, Martin, Perry, Pike, Posey, Spencer, Vanderburgh, and Warrick; and
- (14) District 14, consisting of the counties of Clark, Crawford, Floyd, Harrison, Organe, Scott, and Washington.

APPENDIX "C"**PROFESSIONAL CONDUCT RULE 1.17
SALE OF LAW PRACTICE**

A lawyer or a law firm may sell or purchase a law practice, including goodwill, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law in the jurisdiction in which the practice has been conducted.
- (b) The practice is sold as an entirety to another lawyer or law firm.
- (c) Actual written notice is given to each of the seller's clients regarding:
 - (1) the proposed sale;
 - (2) the terms of any proposed change in the fee arrangement authorized by paragraph (e); and
 - (3) the client's right to retain other counsel or to take possession of the file.
- (d) The client consents to the sale. If a client cannot be given notice or fails to respond to notice of the sale, the representation of that client may not be transferred to the purchaser.
- (e) The fees charged clients shall not be increased by reason of the sale.

The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

APPENDIX "D"**PROFESSIONAL CORPORATIONS, LIMITED LIABILITY COMPANIES AND LIMITED PARTNERSHIPS**

One or more lawyers may form a professional corporation, limited liability company or a limited liability partnership for the practice of law under Indiana code 23-1.5-1, IC 23-18-1 and IC 23-4-1, respectively.

- (a) The name of the professional corporation, limited liability company or limited liability partnership shall contain the surnames of some of its members, partners or other equity owners followed by the words "Professional Corporation," "PC," "P.C.," "Limited Liability Company," "L.L.C.," "LLC," "Limited Liability Partnership," "L.L.P.," or "LLP," as appropriate. Such a professional corporation, limited liability company, or limited liability partnership shall be permitted to use as its name the name or names of one or more deceased or retired members of a predecessor law firm in a continuing line of succession, subject to Rule of Professional Conduct 7.2.
- (b) The professional corporation, limited liability company or limited liability partnership shall be organized solely for the purpose of conducting the practice of law, and, with respect to the practice of law in Indiana, shall conduct such practice only through persons licensed by the Supreme Court of Indiana to do so.
- (c) Each officer, director, shareholder, member, partner or other equity owner shall be an individual who shall at all times own his or her interest in the professional corporation, limited liability company or limited liability partnership in his or her own right and, except for illness, accident, time spent in the armed services or during vacations and/or leaves of absence, shall be actively engaged in the practice of law through such professional corporation, limited liability company or limited liability partnership.
- (d) The practice of law in Indiana as a professional corporation, limited liability company or limited liability partnership shall not modify any law applicable to the relationship between the person or persons furnishing professional legal services and the person or entity receiving such services, including, but not limited to, laws regarding privileged communications.
- (e) The practice of law in Indiana as a professional corporation, limited liability company or limited liability partnership shall not relieve any lawyer of or diminish any obligation of a lawyer under the Rules of Professional Conduct or under these rules.
- (f) Each officer, director, shareholder, member, partner or other equity owner of a professional corporation, limited liability company, or limited liability partnership shall be liable for his or her own acts of fraud, defalcation or theft or errors or omissions committed in the course of rendering professional legal

services as provided by law including, but not limited to, liability arising out of the acts of fraud, defalcation or theft or errors or omissions of another lawyer over whom such officer, director, shareholder, member, partner or other equity owner has supervisory responsibilities under Rule 5.1 of the Rules of Professional Conduct, without prejudice to any contractual or other right that the aggrieved party may be entitled to assert against a professional corporation, limited liability company, limited liability partnership, an insurance carrier, or other third party.

(g) A professional corporation, limited liability company or limited liability partnership shall maintain adequate professional liability insurance or other form of adequate financial responsibility for any liability of the professional corporation, limited liability company, or limited liability partnership arising from acts of fraud, defalcation or theft or error or omissions committed in the rendering of professional legal services by an officer, director, shareholder, member, partner, other equity owner, agent, employee or manager of the professional corporation, limited liability company or limited liability partnership.

(1) "Adequate professional liability insurance" means one or more policies of attorneys' professional liability insurance or other form of adequate financial responsibility that insure the professional corporation, limited liability company or limited liability partnership or both;

(i) in an amount for each claim, in excess of any insurance deductible or deductibles, of fifty thousand dollars (\$50,000), multiplied by the number of lawyers practicing with the professional corporation, limited liability company or limited liability partnership; and

(ii) in an amount of one hundred thousand dollars (\$100,000) in excess of any insurance deductible or deductibles for all claims during the policy year, multiplied by the number of lawyers practicing with the professional corporation, limited liability company or limited liability partnership.

However, no professional corporation, limited liability company or limited liability partnership shall be required to carry insurance or other form of adequate financial responsibility of more than five million dollars (\$5,000,000) per claim, in excess of any insurance deductibles, or more than ten million dollars (\$10,000,000) for all claims during the policy year, in excess of any insurance deductible.

The maximum amount of any insurance deductible under this Rule shall be as prescribed from time to time by the Board of Law Examiners.

(2) "Other form of adequate financial responsibility" means funds, in an amount not less than the amount of professional liability insurance applicable to a professional corporation, limited liability company or limited liability partnership under section (g)(1) of this Rule, available to satisfy any liability of the professional corporation, limited liability company or limited liability partnership arising from acts of fraud, defalcation or theft or errors or omissions committed in the rendering of professional legal services by an officer, director, shareholder, other equity owner, member, partner, agent, employee or manager of the professional corporation, limited liability company or limited liability partnership. These funds shall be available in the form of a deposit in trust of cash, bank certificates of deposit, United States Treasury obligations, bank letters of credit or surety bonds, segregated from all other funds of the professional corporation, limited liability company or limited liability partnership and held for the exclusive purpose of protecting any aggrieved party of the professional corporation, limited liability company or limited partnership in compliance with this Rule.

(h) Each officer, director, shareholder, member, partner or other equity owner of a professional corporation, limited liability company or limited liability partnership shall be jointly and severally liable for any liability of the professional corporation, limited liability company or limited liability partnership based upon a claim arising from acts of fraud, defalcation or theft or errors or omissions committed in the rendering of professional legal services while he or she was an officer, director, member, shareholder, partner or other equity owner, in an amount not to exceed the aggregate of both of the following:

(1) The per claim amount of professional liability insurance or other form of adequate financial responsibility applicable to the professional corporation, limited liability company or limited liability partnership under this Rule, but only to the extent that the professional corporation, limited liability company or limited liability partnership fails to have the professional liability insurance or other form of adequate financial responsibility required by this Rule; and

(2) The deductible amount of the professional liability insurance applicable to the claim.

The joint and several liability of the shareholder, member, partner or other equity owner shall be reduced to the extent that the liability of the professional corporation, limited liability company or limited liability partnership has been satisfied by the assets of the professional corporation, limited liability company or limited liability partnership.

(i) Lawyers seeking to organize or practice by means of a professional corporation, limited liability company or limited liability partnership shall obtain applications to do so and instructions for preparing and submitting these applications from the State Board of Law Examiners. Applications shall be

upon a form prescribed by the State Board of Law Examiners. Two copies of the application for a certificate of registration shall be delivered to the State Board of Law Examiners, accompanied by a registration fee of two hundred dollars (\$200.00), plus ten dollars (\$10.00) for each officer, director, shareholder, member, partner, other equity owner or lawyer employee licensed to practice law in Indiana of the professional corporation, limited liability company or limited liability partnership, two copies of a certification of the Clerk of the Supreme Court and Court of Appeals of Indiana that each officer, director, shareholder, member, partner, other equity owner or lawyer employee who will practice law in Indiana holds an unlimited license to practice law in Indiana, and two copies of a certification of the Indiana Disciplinary Commission that each officer, director, shareholder, member, partner, other equity owner or lawyer employee licensed to practice in Indiana has no disciplinary complaints pending against him or her and if he or she does, what the nature of each such complaint is. Applications must be accompanied by four copies of the Articles of Incorporation, Articles of Organization or Registration of the professional corporation, limited liability company or limited liability partnership with appropriate fees for the Secretary of State. All forms are to be filed with the State Board of Law Examiners.

Upon receipt of such application form and fees, the State Board of Law Examiners shall make an investigation of the professional corporation, limited liability company or limited liability partnership in regard to finding that all officers, directors, shareholders, members, partners, other equity owners, managers of lawyer employees licensed to practice law in Indiana are each duly licensed to practice law in Indiana and that all hereinabove outlined elements of this rule have been fully complied with, and the Clerk of the Supreme Court and Court of Appeals shall likewise certify this fact. The Executive Secretary of the Indiana Disciplinary Commission shall certify whether a disciplinary action is pending against any of the officers, directors, shareholders, members, partners, other equity owners, managers or [sic] lawyer employees licensed to practice in Indiana. If it appears that no such disciplinary action is pending and that all officers, directors, shareholders, members, partners, other equity owners, managers of lawyer employees required to be are duly licensed to practice law in Indiana are, and that all hereinabove outlined elements of this Rule have been fully complied with, the Board shall issue a certificate of registration which will remain effective until January 1st of the year following the date of such registration.

Upon written application of the holder, upon a form prescribed by the State Board of Law Examiners, accompanied by a fee of fifty dollars (\$50.00), the Executive Director of the Board shall annually renew the certificate of registration, if the Board finds that the professional corporation, limited liability company or limited liability partnership has complied with the provisions of the statute under which it was formed

and this Rule. Such application for renewal shall be filed each year on or before November 30th. Within ten (10) days after any change in the officers, directors, shareholders, members, partners, other equity owners or lawyer employees licensed to practice in Indiana, a written listing setting forth the names and addresses of each shall be filed with the State Board of Law Examiners with a fee of ten dollars (\$10.00) for each new person listed.

Copies of any amendments to the Articles of Incorporation, Articles of Organization or Registration of the professional corporation, limited liability company or limited liability partnership thereafter filed with the Secretary of State's office shall also be filed with the State Board of Law Examiners.

TRAIN, TRAILS, AND PROPERTY LAW: INDIANA LAW AND THE RAILS-TO-TRAILS CONTROVERSY

DANAYA C. WRIGHT*

INTRODUCTION

The Indiana Supreme Court spent much of its time in 1997 focused on issues other than property disputes. Only a small handful of property cases came out of the high court this past year, and they were principally concerned with arcane rules of deed construction in abandoned railroad corridors. Not surprisingly, however, this is a topic that has generated strong feelings on all sides of the issue, as Indiana is only lately getting on the rails-to-trails bandwagon.¹ The supreme court decided four major cases in this area, two of which had been on petition to transfer for almost two years. Unfortunately, the first three of these cases are subject to some questionable reasoning and consequently provide confusing precedents to lower courts which may result in further litigation before these rails-to-trails cases finally can be put to rest. The fourth, however, is a lengthy analysis of the increasingly important issue of deed interpretation and provides helpful guidance for lower courts.

I. RAILROAD TITLE CASES

A. *Hefty v. All Other Members of the Certified Settlement Class*

The first case to be decided was *Hefty v. All Other Members of the Certified Settlement Class*,² in which a class of adjoining landowners sued Penn Central Corporation and U.S. Railroad Vest Corporation (USRV) to quiet title to an abandoned railroad corridor.³ In July 1992, Warren Buchanan filed a class action suit in Parke County against Penn Central and USRV claiming slander of title of persons owning land adjacent to a line in Parke County. The following month, he moved to expand the class to include everyone owning land adjacent to an abandoned Penn Central corridor anywhere in Indiana. A competing class action

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1. This topic is near and dear to my heart. See Danaya C. Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-Trails in Indiana*, 30 IND. L. REV. 723 (1997). Rails-to-trails is a program that furthers federal railbanking and interim trail use policies by converting abandoned rail corridors to linear parks and pedestrian trails. Railbanking is a federally mandated policy of preserving rail corridors for possible future activation in light of increasing transportation demands. Interim trail use is allowed on railbanked corridors to further the public need for linear parks, greenways, and recreational trails, so long as doing so is not inconsistent with corridor preservation. *Id.* at 723-24.

2. 680 N.E.2d 843 (Ind. 1997).

3. Penn Central had conveyed its interests in most abandoned corridors in Indiana to USRV for the purpose of relinquishing for sale its property rights to corridor land it no longer needed.

was filed in Hamilton in October 1992 by Fern Firestone alleging similar claims against USRV of fraud, slander of title, theft, criminal conversion, criminal mischief and deception, and RICO violations. In December, Buchanan amended his complaint to enlarge the class and add the RICO, conversion, and fraud claims. On the same day, the trial court approved Buchanan's class for settlement purposes and approved James Buchanan, Warren's son, as class counsel.⁴ The parties submitted a proposed settlement agreement and a hearing was set for April 1993, less than four months later. In the meantime, Firestone sought to intervene in the Buchanan action to prevent sending of the settlement notice and to petition for revocation of the Buchanan class certification. When that was denied, Firestone obtained a statewide class certification in the Hamilton County trial court; however, Buchanan succeeded in having the order vacated, and the two actions were consolidated pursuant to Indiana Trial Rule 42(D). After additional motions and objections, the Parke County Circuit Court accepted the Buchanan class settlement agreement in April 1993 without testimony from nonclass members or class members who had opted out. The next year, the court of appeals affirmed the trial court's judgment, noting that those who had opted out had preserved their right to appeal and that the settlement was fair and reasonable.⁵ The saga of the battling class action suits then headed to the supreme court as transfer was granted in July 1995.⁶

On June 2, 1997, the Indiana Supreme Court reversed the trial court's approval of the settlement agreement and remanded the case for further proceedings.⁷ This case is principally about the appropriate standards for approving class settlements, especially when they occur early in the litigation process before adequate time for discovery and negotiations. However, it is not coincidental that a case involving property rights to abandoned railroad corridors would spark such bitter disputes between competing class representatives and class counsel who see the growing rails-to-trails movement as a divisive political issue with the potential for punitive damage and royalty awards. Counsel for the intervening Firestone class, Nels Ackerson of Washington, D.C., has filed class action suits against at least three major railroads in Indiana, and one utility company, in the name of adjoining property owners whose rights, he claims, are being violated by big corporate conglomerates.⁸ On the other hand, counsel for

4. *Hefty*, 680 N.E.2d at 847.

5. *Id.* (citing *Hefty v. All Other Members of the Certified Settlement Class*, 638 N.E.2d 1284, 1288-92 (Ind. Ct. App. 1994)).

6. *Hefty*, 680 N.E.2d at 847.

7. *Id.* at 858.

8. "A huge investment of money has gone into combating the 'level of arrogance that sometimes accompanies companies that have a lot of power'" *Abandoned Rails: What's Right Should Count*, HENDRICKS COUNTY FLYER, Dec. 22-28, 1997, at A6 [hereinafter *Abandoned Rails*] (quoting Nels Ackerson). At the December 1997 Indiana Farm Bureau state convention, Ackerson presented a special interest session: "A Billion Dollar Hoax, the Great Railroad Robbery." *Id.* See also *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties' motions for partial summary judgment);

the Buchanan class, as the son and law partner of the class representative, may not have had the best interests of the entire class in mind when he accepted the settlement agreement.⁹ Neither class, therefore, presents a compelling picture of oppressed victims who must band together to fight corporate America.¹⁰ But with the prospect of punitive damages and royalties from utility companies, the rights to abandoned railroad corridors have taken on greater importance for adjacent landowners, recreational trail developers, railroads, utility companies, city and county service providers, and lawyers. It is not accidental, therefore, that Justice Sullivan cited Judge Posner's warning that "[c]lass actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest. This fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems."¹¹ The saga of the dueling classes, while primarily about the law regarding class action settlements, was made possible in this instance precisely because Indiana law on railroad abandonments was hospitable to a variety of claims about overreaching railroad practices.

The supreme court in *Hefty*, noting that one element of the reasonableness of class settlements is the likelihood of success on the merits, hoped to forestall the flood of rails-to-trails cases that are working their way up through the courts by briefly discussing the general principles of deed interpretation. Unfortunately, Justice Sullivan's brief discussion did not allow for a thorough analysis of the many different issues that complicate any deed interpretation. In the interests of brevity, I will outline what are the principal rules and statutes that should be considered in any railroad deed case and then summarize the contributions of these recent cases to the law.

In 1852, the Indiana General Assembly passed two statutes. The first states that "any conveyance of lands worded in substance as . . . 'A.B. conveys and warrants to C.D.' . . . shall be deemed and held to be a conveyance in fee simple."¹² This statute does not require that the words "fee simple" be present in the conveyance, nor was use of the phrase in form deeds common until well into the twentieth century.¹³ This statute also does not distinguish between

CSX Transp., Inc. v. Clark, 646 N.E.2d 1003 (Ind. Ct. App. 1995); Calumet Nat'l Bank v. American Tel. & Tel. Co., 682 N.E.2d 785 (Ind. 1997). Ackerson has also been involved in railroad suits in other states. *See, e.g.*, Becker v. Surface Transp. Bd., 132 F.3d 60 (D.C. Cir. 1997) (property owner challenge to conversion of right-of-way to trails in Kansas).

9. *See Hefty*, 680 N.E.2d at 856-57.

10. Penn Central came out of bankruptcy in the late 1970s and transferred all of its railroad assets to Conrail, and USRV, a private entity, was established solely for the purpose of disposing of unwanted property rights in the various states. Jeff Swiatek, *Railbed Ownership Gets Sidetracked*, INDIANAPOLIS STAR, Mar. 28, 1993, at B1.

11. *Hefty*, 680 N.E.2d at 849 (quoting *Mars Steel v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 678 (7th Cir. 1987)).

12. 1 REV. STAT., ch. 23, § 12 (1852) (codified at IND. CODE § 32-1-2-12 (1993)).

13. The essential elements of a deed are: "identification of the parties, description of the land, some words indicating present intent to convey, and the grantor's signature." *See ROGER A.*

conveyances to railroad companies and conveyances to private individuals. Thus, a conveyance to a railroad company worded in conformity with the statute must be construed to convey a fee simple if we are going to protect the integrity of all deeds. This statute continues unchanged.

The second statute allowed the railroads to acquire through condemnation proceedings whatever “land as is deemed necessary for its railroad, including necessary side-tracks and water stations, materials for constructing, except timber, a right-of-way over adjacent lands sufficient to enable the company to construct and repair its road, and a right to conduct water by aqueducts and the right of making proper drains.”¹⁴ Under this condemnation power, a number of railroads acquired land, both by purchase and by condemnation, for their depots, roundhouses, and corridors. In 1905, the general assembly limited the right of railroads to condemn fee simple title to land for their corridors, but left intact their right to condemn fee simple title to land for other railroad purposes.¹⁵ What is crucial to understanding the role of the 1852 and 1905 condemnation statutes is: 1) the railroads could *purchase* any interest they wanted, including fee simple, both before and after the 1905 Act; 2) they could acquire by condemnation fee simple title to any land between 1852 and 1905; 3) they could acquire fee simple title by condemnation to all but their corridor land after 1905; and 4) statutory limitations on their condemnation power do not affect in any way the deed interpretation of railroad conveyances they acquired by purchase. Deeds are deeds, whether they were given to railroads or private individuals, and must be construed according to standard principles of deed construction.¹⁶

As one can imagine, actual railroad practices of land acquisition varied for every parcel: some people granted clear conveyances of fee simple title; others granted easements; some fought the railroads in court and had their land acquired through condemnation proceedings; and some never gave a deed and never challenged the railroad’s rights to operate on their land. So long as the railroad was in operation, challenges by original landowners were unlikely to succeed.¹⁷ But problems naturally arose when the railroad discontinued operations along a particular track and the adjacent landowner, who may or may not have been the original grantor, wished to reacquire use of that land.

CUNNINGHAM ET AL., THE LAW OF PROPERTY § 11.1 (2d ed. 1993). Just as deeds using the term “right of way” are construed as passing easements, deeds that use the terms “convey and warrant the land” are construed to pass fee simple title.

14. 1 REV. STAT., ch. 23, § 15 (1852) (codified at IND. CODE § 8-4-1-16(a) (1993)).

15. Act of Feb. 27, 1905, ch. 48, § 1, 1905 Ind. Acts 59, 59-60 (codified as amended at IND. CODE § 32-11-1-1 (1993)). “Whenever land is taken by condemnation proceedings, the entire fee simple title may be taken and acquired if the land is taken for the site at a station, terminal, powerhouse, substation, roundhouse, yard, car barn, office building, or other purpose, except for a right-of-way.” IND. CODE § 32-11-1-1(d).

16. “The deed given, when executed in lieu of condemnation, shall convey only the interest stated in the deed.” IND. CODE § 32-11-1-1(d).

17. Adverse possession, prescriptive rights, and the power of condemnation all functioned to stabilize the railroad’s property rights to lands they were currently using.

Indiana cases consistently hold that the general rule is that a "conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put . . . is to be construed as passing an estate in fee, but reference to right of way in such a conveyance generally leads to its construction as conveying only an easement."¹⁸ This rule comports with traditional property doctrines that construe conveyances of "land" to be fee simples and conveyances of "rights" to be easements. This rule was cited by Justice Sullivan in *Hefty*,¹⁹ and clearly contradicts the arguments of class counsel that the railroads could not acquire fee simple title to property.²⁰

The rules of deed construction are relatively straightforward. Absent ambiguity in a deed, "the intention of the parties must be determined from the language of the deed alone."²¹ Since railroads were responsible for drafting these conveyances, any ambiguities are to be interpreted strictly against the drafter.²² Ambiguities most often arise in these railroad deeds from the presence of fee simple language (convey and warrant the land) but with additional limitations (for railroad purposes) that would lead to an inference that a defeasible fee was intended, but also containing references to the property as a right-of-way (easement language). The sticking point in these cases is the role of the term "right-of-way," a term that the U.S. Supreme Court has noted has two distinct meanings: an easement and the corridor land on which a railroad operates its tracks.²³ Thus, if the deed contains all easement language (grants or reserves a right) and subsequently refers to the railroad's interest as a right-of-way, there is a clear grant of an easement. If the deed contains all fee simple language (conveys and warrants the land) with no reference to the interest as a right-of-way, there is a clear grant of a fee simple. However, if the deed contains a combination of the two, since the 1964 case of *Ross v. Legler*,²⁴ the tradition in Indiana has been to construe such ambiguous conveyance to grant only an easement because public policy

does not favor the conveyance of strips of land by fee simple titles to railroad companies for right-of-way purposes, either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to

18. L & G Realty & Constr. Co. v. Indianapolis, 139 N.E.2d 580, 585 (1957) (citation omitted); *see also Hefty*, 680 N.E.2d at 853-55 (citing *Brown v. Penn Cent. Corp.*, 510 N.E.2d 641 (Ind. 1987)).

19. *Hefty*, 680 N.E.2d at 853-54.

20. *See Abandoned Rails*, *supra* note 8; *see also Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404, at 13-14 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties' motions for partial summary judgment); *Tazian v. Cline*, 686 N.E.2d 95 (Ind. 1997).

21. *Hefty*, 680 N.E.2d at 853.

22. *Id.* at 854.

23. *Joy v. City of St. Louis*, 138 U.S. 1, 44 (1890).

24. 199 N.E.2d 346 (Ind. 1964).

the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of the property involved.²⁵

Justice Sullivan in *Hefty* recited these rules and deduced from preceding Indiana cases three general principles of deed construction: 1) conveyance to a railroad of a strip of land without additional limitations is to be construed as passing a fee, but reference to a right-of-way generally leads to its construction as conveying only an easement; 2) deeds prepared by railroads will be construed most favorably to the grantors; and 3) if ambiguity is present, courts will construe the absence of fee simple language as evidence that the parties intended to convey an easement and, in furtherance of public policy, will construe ambiguous instruments in favor of the original grantors, their heirs, or assigns.²⁶ Notably, the opinion did not mention the footnote to the *Ross* public policy rule, which stated that “a possible and reasonable exception within the public policy might exist where such easement and right-of-way is conveyed to and dedicated by a governmental body for a public right-of-way.”²⁷ Furthermore, Justice Sullivan did not address the burden of proof issue that the adjacent landowners in most of these cases may not be the heirs or assigns of the original grantor.²⁸

The burden of proof issue is extremely important in all of the pending class action lawsuits regarding abandoned railroad corridors. The number one cardinal rule of property law is that one cannot convey what one does not own. Lawyers for adjacent landowners are claiming that the railroads, when they attempt to convey their property interests in their corridors to trail groups, are doing exactly that. If they held only easements, and those easements have been abandoned, the railroads have nothing to sell.²⁹ However, the railroads readily admit that their property holdings in most corridors are a complicated mixture of interests, and

25. *Id.* at 347-48.

26. *Hefty*, 680 N.E.2d at 855. This last principle is troubling if courts interpret it to mean that unless the deed uses the term “fee simple” it will be construed to be an easement because such an interpretation violates the 1852 conveyancing statute as well as standard deed practices.

27. *Ross*, 199 N.E.2d at 348 n.2.

28. *See id.* at 347. In many cases, the original grantor, after granting an interest to a railroad, will choose to sell his remaining land. In doing so, he will need to provide the buyer with a warranty deed, something difficult to do without either severing the railroad’s corridor land from the remainder of his land or including a description of the railroad’s interest in the corridor land as an encumbrance. Needless to say, if courts are genuinely interested in determining the original grantor’s intent, they should be looking at subsequent deeds for evidence of what the grantor believed he or she was retaining and could then convey to a subsequent buyer. The burden of proving this should fall on the adjacent landowner who seeks to disprove the railroad’s title.

29. Of course, if the railroad held fee simple, it may sell just as any other landowner might. If it takes a quiet title action and a lengthy court dispute to interpret the railroad’s property interest, then claims that the railroads are maliciously guilty of slander of title or criminal conversion which should be subject to punitive damages would be difficult to support.

as a result they will only give a quit-claim deed. The adjacent landowners forget, however, the number two cardinal rule of property law, which is that one cannot acquire title to land simply by challenging defects in a neighbors' title; one must provide proof of better title. This reflects the weakness in all of these railroad title cases and the impropriety of using class actions to resolve what are basically quiet title disputes. Each deed and condemnation instrument is different and all of these rules require case-by-case deed analysis of the conditions and terms of the instruments. Quiet title cases center on the grantor's intent which is different in every instance. Most of the adjacent landowners whose title claims are questioned by the railroads do not have record title to the underlying land. Thus, even if the railroads only held easements, Justice Sullivan correctly noted that it would be the original grantor's heirs who retained title to the underlying fee, not the adjacent landowners whose land was severed from the railroad corridor nearly 100 years ago.³⁰

Thus, *Hefty* leaves us with three general propositions that are not particularly useful in case-by-case deed analysis except to reiterate the long-standing rule in Indiana that deeds prepared by the railroads should be construed strictly against the drafters. Two weeks after *Hefty*, the supreme court handed down opinions in two other railroad title cases: *Consolidated Rail Corp. v. Lewellen*³¹ and *Calumet National Bank v. American Telephone & Telegraph*.³²

B. Consolidated Rail Corp. v. Lewellen

The first case, *Lewellen*, was a disastrous opinion because the court blindly affirmed the Indiana Court of Appeals' decision with virtually no legal analysis of the deed language and no apparent concern for upsetting long-established property rights and rules. In *Lewellen*, many of the deeds at issue stated: "[Grantor], for consideration, ' . . . hereby Conveys and Warrants to the [Railroad] the Land, Right of way and Right of Drainage for its Railway . . . '"³³ Unlike the court of appeals, the supreme court did not believe that this deed was ambiguous; instead, it held that the deed unambiguously conveyed an easement.³⁴ The court held that this deed did not track the 1852 conveyancing statute³⁵ despite the fact that it included the requisite terms "convey," "warrant," and "the land" because, as Justice Sullivan noted, it had the additional term in the granting clause of "right-of-way."³⁶ It apparently did not occur to the court that this deed might convey three separate interests: the corridor land, a right of way for access to the corridor land across the neighboring fee, and a right to expel surface water onto the neighboring fee from the elevated roadbed. Sadly, the court also failed

30. *Hefty*, 680 N.E.2d at 855.

31. 682 N.E.2d 779 (1997).

32. 682 N.E.2d 785 (1997).

33. *Lewellen*, 682 N.E.2d at 780 (alteration in original).

34. *Id.* at 782.

35. See IND. CODE § 32-1-2-12 (1993).

36. *Lewellen*, 682 N.E.2d at 781.

to note the second 1852 statute that explicitly provided that railroads could acquire these three distinct interests through condemnation.³⁷ The striking similarity between the deed language in the *Lewellen* case and the 1852 railroad condemnation statute, in addition to the use of the statutory terms “convey and warrant the land,” could only lead to the exact opposite conclusion the court reached, which is that these deeds were unambiguous conveyances of a fee simple in the corridor land to the railroad, not an easement. The court’s only reason for its misguided decision was the oft-cited language that “reference to a right-of-way in such conveyance generally leads to its construction as conveying only an easement.”³⁸ This reasoning not only neglected the equally well-established fact that the term right-of-way has two meanings, and that “generally leads to” does not mean “inevitably leads to,” but also neglected the public policy reasons that might justify finding title in the railroad.³⁹ In attempting to reconcile the fee simple language of “convey and warrant the land” with the easement language of “right-of-way,” the court rejected both the argument that there were two different interests being conveyed (the land and a right-of-way to access the land) and the argument that if it was only one interest being conveyed, the greater (the land) should include the lesser (the right-of-way).⁴⁰ Instead, it adopted the court of appeals’ incomprehensibly silly argument that the presence of the greater and the lesser terms meant that the grantor intended only to convey the lesser, because if he had intended to convey the greater he would not have mentioned the lesser.⁴¹

The court in *Lewellen* then held that the particular corridor in dispute, because it was an easement, was subject to extinguishment through willful abandonment.⁴² Abandonment results in the unburdening of the underlying fee, not the “reversion” of a future interest nor the “passing” of the railroad’s rights to the adjoining landowner.⁴³ The encumbrance of the easement is simply removed and the fee holder then possesses unencumbered title. Under Indiana common law, mere nonuse is not enough to extinguish an easement created by

37. IND. CODE § 8-4-1-16 (1993) (allowing railroads to acquire whatever land was necessary for their railroads, plus “a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts and the right of making proper drains”).

38. *Lewellen*, 682 N.E.2d at 782 (citations omitted).

39. See *id.* at 782 n.4. At the time suit was brought, West Central Indiana Rails to Trails, Inc., had already purchased Conrail’s interest in the corridor for a public trail. *Id.* at 780.

40. *Id.* at 781-82.

41. See *Conrail v. Lewellen*, 666 N.E.2d 958, 962-63 (Ind. Ct. App. 1996).

42. *Lewellen*, 682 N.E.2d at 782-84.

43. This is despite the incorrect construction of the easement holder’s interest which is often misquoted by Indiana courts: “where easement granted for railroad purposes, upon abandonment the easement automatically *reverts* to the heirs and devisees of the grantors,” *L & G Realty & Constr. Co. v. City of Indianapolis*, 139 N.E.2d 580, 588 (1957), or “upon abandonment of the railroad, the property *passed* to the adjoining landowners,” *Richard S. Brunt Trust v. Plantz*, 458 N.E.2d 251, 255 (Ind. Ct. App. 1983).

express grant, and intent to abandon is a necessary element for finding abandonment.⁴⁴ In this case, the court declined to apply the common law easement rules because the Indiana General Assembly had enacted a statute in 1987 specifically governing railroad abandonment.⁴⁵ The statute provided that abandonment would occur upon the issuance of an Interstate Commerce Commission (ICC) certificate of abandonment and the removal of "rails, switches, ties, and other facilities."⁴⁶ In 1992, this statute was declared unconstitutional⁴⁷ and reenacted in 1995.⁴⁸ In a rather questionable move, the court held that if the rails and ties had been removed and an ICC certificate of abandonment had been granted as of the date of the 1987 statute's enactment, the abandonment was complete, despite the fact that the statute was later held to be unconstitutional and that the railroad's pre-1987 actions might not have risen to the level of abandonment under the common-law intent standard.⁴⁹ The court did not apply the statute retroactively, but held that it provided a "legal definition of 'abandonment' . . . for use on and after July 1, 1987."⁵⁰ Hence, although the railroad may have maintained its interest under the common-law intent standard, its easement would be terminated on the enactment date of the statute because it then met the abandonment conditions. As a result, the court held that Conrail had abandoned its easement even though it continued to pay property taxes on its corridor, continued to act like an owner over the land, and did not remove trestles, bridges, culverts, drainage tiles and subsurface ballast, i.e., even though it did not manifest the requisite intent to abandon necessary under the common-law rules in effect at the time it removed the tracks.⁵¹

The *Lewellen* decision places county auditors, assessors, and recorders in an untenable position. For instance, the railroads have been operating under the belief that they had fee simple title to this land. They have paid their property taxes and been responsible for maintenance of the land. The court has now

44. *Lewellen*, 682 N.E.2d at 783 (citing *Seymour Water Co. v. Leblanc*, 144 N.E. 30, 33 (Ind. 1924); *Brock v. B & M Moster Farms, Inc.*, 481 N.E.2d 1106 (Ind. Ct. App. 1985)). Even a prescriptive easement requires nonuse and intent to abandon. *Id.* (citing *Bauer v. Harris*, 617 N.E.2d 923 (Ind. Ct. App. 1993)).

45. *Lewellen*, 682 N.E.2d at 783 & n.7 (citing former IND. CODE § 8-4-35-4 (1993) (repealed in 1995)). This statute was passed in response to the 1983 National Trails System Act, Pub. L. No. 98-11, §§ 201-207, 97 Stat. 42, 42-50 (codified as amended at 16 U.S.C. §§ 1241-1251 (1994 & Supp. I 1995)), in an attempt to frustrate the federally mandated policies of railbanking and corridor preservation. By loosening the common law abandonment rules, the legislature attempted to extinguish core property rights that had been protected for over a century.

46. *Lewellen*, 682 N.E.2d at 783 & n.7.

47. *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158 (7th Cir. 1992).

48. See IND. CODE § 32-5-12-6(a)(2) (Supp. 1997).

49. *Lewellen*, 682 N.E.2d at 783-84.

50. *Id.* at 783.

51. Under the doctrine of ejusdem generis, the court held that "rails, switches, ties and other facilities" did not include trestles, bridges, culverts, and the like. *Id.* at 784. See *Wright, supra* note 1, at 751-52 (criticizing the court's reasoning in *Lewellen*).

determined that they not only did not have fee simple title, but that their easements had been extinguished at least as early as 1987 if not earlier. The adjacent landowner, however, lacks record title to the underlying fee. If the recorder changes Lewellen's deed to include the corridor land, the recorder may be subject to suit from the original grantor's heir who might have the requisite deed. Furthermore, if the corridor land is attached to Lewellen's deed (and thus she profited not from the strength of her own title but solely from the weakness in the railroad's title), the county assessor must reassess her land to recover from her the property taxes that the railroad quite reasonably is going to stop paying. The railroads pay taxes on the value of the intact corridor, though, which is significantly higher than the sum of its parts. The increased value of Lewellen's land is likely to be minuscule, even when added to the increased value of all the other parcels deemed to be adjacent to railroad easements, in comparison to the taxes accruable on the more valuable intact corridor. Hence, the county property tax base will suffer, county recorders and assessors will have hugely disproportionate administrative costs associated with reallocating the property rights involved than they will make up for in increased property tax revenues from adjacent landowners, and the state and federal railbanking policies will be frustrated. Moreover, this result occurs in the name of deed construction that is unsupportable by any reasonable interpretation of Indiana precedents, property law doctrines, or the language of this particular deed.

C. Calumet National Bank v. American Telephone & Telegraph Co.

In *Calumet National Bank v. American Telephone & Telegraph Co.*,⁵² the court devised a circular way to have its cake and eat it too. The dispute in *Calumet* involved a utility sub-easement license in an abandoned railroad corridor and the operation of the unconstitutional 1987 Rights-of-Way Act. The following chronology is important to understanding the court's decision in this case. Prior to 1982, Conrail acquired a rail corridor between Winamac and Crown Point, Indiana. In 1982, Conrail acquired an ICC abandonment certificate and by the end of 1985, removed its tracks and ties. In January 1984, however, Conrail entered into a license agreement with AT&T to install and operate fiber optic cables generally "along railroad right-of-way between Harrisburg, PA, and Chicago, IL."⁵³ In 1988, the agreement was amended to include the Winamac to Crown Point corridor. The appellant, Calumet National Bank, as trustee, owns the land adjacent to a six-mile stretch of this corridor. None of the deeds identifying the trust's interests in the adjacent land includes a description of the corridor land, nor any mention that the conveyance includes fee simple title in the corridor subject to Conrail's easement. In a prior quiet title action not at issue in the case, Conrail's interests in the corridor were held to be mere easements.⁵⁴ Hence, the questions addressed on appeal were whether Conrail had abandoned

52. 682 N.E.2d 785 (1997).

53. *Id.* at 787.

54. *Id.*

its interests, thus extinguishing the easement, and whether the trust owned the underlying fee and thus received the railroad's interest upon abandonment.

Remember the cardinal rule that one cannot acquire title to land by challenging defects in a neighbor's title? AT & T quite correctly argued that under the common law, a landowner "whose deed did not contain any description of an adjacent right-of-way acquired no interest in the right-of-way upon abandonment thereof."⁵⁵ If an easement is extinguished and no one can prove ownership of the underlying fee, the land escheats to the state.⁵⁶ But another provision of the 1987 statute provided that adjacent landowners who did not have a deed description of corridor land would be entitled to annex it if no other titleholder appeared and the railroad's easement was abandoned.⁵⁷ Thus, AT & T argued that because the trust did not have record title to the abandoned corridor, its property rights could not be created until 1987 when the statute was passed or the date Conrail abandoned the easements, whichever was later.

Had the court done what it did in *Lewellen* and ruled that Conrail had abandoned as of 1987, the trust's property rights would have been created simultaneously with the destruction of Conrail's rights. But foregoing all attempts at logic and consistency, the court applied the statute retroactively to hold that "Conrail's interest in the right-of-way was extinguished no later than December, 1985."⁵⁸ Applying a statute that was not in effect until two years later to terminate valuable property rights should raise at least one judicial eyebrow. Applying it retroactively to create the corresponding property rights in the trust should raise the other eyebrow, even if doing so would be consistent.

However, the statutorily-created property rights in the adjacent landowners required a recording and hearing process in order to be perfected.⁵⁹ The trust failed to meet the requirements and thus had not perfected their interests under the statute in 1985 when the easement was extinguished, in 1987 when the statute was passed, in 1989 when the trust filed suit, nor in 1992 when that part of the statute was declared unconstitutional. Thus, even if the statute had been applied retroactively to create property rights for the trust in 1985, the trust could not have succeeded in claiming title because it had not met the minimal procedural requirements that were held to be unconstitutional and inadequate for terminating the railroad's property rights.⁶⁰ So, unable to apply the statute to create property rights in the trust, the court relied on the pre-statute common law of other states to rule that the rights of adjacent landowners with no deeds extended to the

55. *Id.* at 789.

56. It is difficult to understand why the state would be willing to surrender its interest in unowned parcels of abandoned railroad corridors, some of which are located in valuable urban centers and are windfalls to land developers, especially in light of the federal and state policies promoting railbanking and interim trail use.

57. IND. CODE § 8-4-35-5 (1987) (repealed 1995) (current version at IND. CODE § 32-5-12-10 (Supp. 1997)).

58. *Calumet*, 682 N.E.2d at 788.

59. IND. CODE §§ 8-4-35-6 to -7 (1987) (repealed 1995).

60. *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158 (7th Cir. 1992).

center of the corridor⁶¹ and that upon abandonment, the trust's title was no longer burdened by the easement nor did it have to record its title or file the requisite affidavits.⁶² In other words, the court would not apply the well-established common-law rules on abandonment which were in effect at the time to determine if Conrail had indeed manifested the requisite intent to abandon. However, the court would apply the common-law rules of other states to the creation of the trust's property rights when there was no Indiana precedent at the time and consistently applying the statute would have dictated a different result. It is difficult to explain how this result is the product of anything other than spurious results-oriented reasoning. By reasoning backward from the statute, the court created property rights in the deedless adjoining landowners that would be considered stronger than the rights of the railroad (who had been using the property, paying taxes on it, maintaining it, and had a deed to it) and the state that had a clear interest in preserving railroad corridors and implementing recreational trails and linear parks.⁶³

D. *Tazian v. Cline*

If the court really dropped the ball in the *Hefty*, *Lewellen*, and *Calumet* cases, it redeemed itself in part in the fourth railroad title case, *Tazian v. Cline*.⁶⁴ In *Tazian*, an 1873 handwritten deed to the Fort Wayne Railroad was deemed to have conveyed to the railroad fee simple absolute. The deed language in this case was as follows:

said parties of the first part in consideration of five hundred dollars . . . do grant and convey and warrant to the party of the second part . . . a strip of land . . . over, across, and through the following described tract of land . . . said strip of ground to be on and along the central line of said railroad as the same shall be finally located on such tract of land. . . . With the right also . . . to cut down standing timber . . . to have and to

61. *Calumet*, 682 N.E.2d at 790. This is patently unreasonable. If the grantor intended to convey land to the middle of the corridor when he subsequently sold his remaining parcel, he would have included a description of the corridor land. His failure to include that land can only be interpreted as his belief that he did not own it to sell. He could not convey the remainder of this parcel, after the railroad corridor was removed, by warranty deed. So his severance of the property is a likely indication that he did not think he owned the corridor.

62. *Id.*

63. One must ask why the court would be willing to look into its crystal ball and modify property rights in 1985 based on the future 1987 statute, but would not look to the 1995 statute announcing a strong public policy in preserving abandoned railroad corridors and building linear trails and parks. And one might imagine that, while the court is willing to accept later-enacted statutes as evidence of prior-existing property rights, it might also take into account that this particular statute was held unconstitutional precisely for depriving the railroads of their property rights without due process of law. *See Penn Cent. Corp. v. U.S. R.R. Vest*, 955 F.2d 1158 (7th Cir. 1992).

64. 686 N.E.2d 95 (Ind. 1997).

hold all and singular the said premises . . . unto the said Fort Wayne . . . Railroad Company and their successors and assigns forever for the uses and purposes therein expressed.⁶⁵

In this case, Alice Cline purchased a 4.24 acre strip of land from Penn Central in 1985 by quitclaim deed. This strip abutted land owned by the Tazians who claimed title to the centerline of the corridor under all the theories advanced in the prior cases. The court here recognized that the original deed language was determinative; if the original grant conveyed fee simple, Cline was the successor in interest to the entire corridor.⁶⁶ If the grant conveyed only an easement to the railroad, Cline would have taken nothing because the easement would have been extinguished upon abandonment by Penn Central.⁶⁷ The court correctly noted that “[i]n a quiet title action, one must recover upon the strength of his or her own title” and not upon the weaknesses of one’s opponent’s title.⁶⁸ The fact that the Tazians had no title, except whatever rights accrued to them by virtue of no one else having better title, finally seemed relevant to the court in this case, though it had no relevance in *Hefty*, *Lewellen*, or *Calumet*.

The court first noted that the deed language was consistent with the “convey and warrant” language of the 1852 conveyancing statute and further noted that while such evidence is not determinative but merely a factor in determining whether the parties intended to convey a fee simple, in this case, the instrument did not refer to the grant of a right nor did the deed appear to limit the conveyance to a right-of-way.⁶⁹ Consequently, the court deemed the granting clause to clearly convey a fee simple absolute.⁷⁰ The court also rejected the arguments of amici (the same counsel that represented the landowners in *Lewellen*, the second class in *Hefty*, and amici adjacent landowners in *Calumet*) that the “across, over and through” language indicated an intent to limit the grant to an easement.⁷¹ The court noted that in all cases in which similar “over and through” language was present and an easement was found, the term right-of-way appeared in the granting clause.⁷² Because this deed did not limit the use or purposes of the land, nor did it contain the term “right-of-way,” the “over and through” language was deemed not controlling.⁷³ The court further rejected arguments that an easement should be deemed the intent of the parties because part of the consideration was the “benefits anticipated from said railroad when constructed,”⁷⁴ because the specific land was not identified by metes and

65. *Id.* at 96.

66. *Id.* at 97.

67. *Id.*

68. *Id.* The court would have done well to remind the Appellees of this rule in *Lewellen*.

69. *Id.* at 98.

70. *Id.*

71. *Id.* at 98-99.

72. *Id.* at 99.

73. *Id.*

74. *Id.* “Benefits” mean the increase in value of remaining land of the grantor. See

bounds,⁷⁵ and because the deed included the phrase in the habendum clause "for the use and purposes therein expressed."⁷⁶ All of these determinations were made with the careful reference to prior case law and a sensitivity to the nuances of deed construction that were noticeably absent in the prior cases. The court offered as final evidence for its construction of a fee simple, the fact that the deed did not describe the interest conveyed as a railroad right-of-way nor limit the conveyance for railroad purposes or uses only.⁷⁷

The *Tazian* case represents a refreshing departure from the previous three supreme court decisions. Justice Sullivan devoted sixteen paragraphs to legal analysis of the different factors that should be weighed in interpreting nineteenth-century deeds. This should be compared to six paragraphs in *Hefty*, four in *Lewellen*, and none in *Calumet*. The *Tazian* case is solely about deed interpretation and Justice Sullivan correctly weighed all the complex and difficult factors that the law uses to evaluate the deed language and the intent of the parties. It is unfortunate that the court did not hear oral arguments or accept briefs in the *Lewellen* case or it might have done a more thorough job of deed interpretation and realized that multiple interests in land can be conveyed in the same instrument. In *Tazian* the deed conveyed the land plus a right to cut timber. In *Lewellen* the deed conveyed the land plus a right of access and a right of drainage. There is no principled distinction between the two except that the deed in *Lewellen* identified all the interests in the granting clause, and the *Tazian* deed buried the right to timber below the land description. But unless the court is willing to reopen the *Lewellen* case, the inconsistency will remain a thorn in the sides of trial court judges. The *Tazian* decision also settles, despite arguments by amici landowners, the issue that the railroads could and did acquire fee simple title to land, just like any other individual or corporation.⁷⁸

But lest I get too enthusiastic about the importance of *Tazian* in heralding a new era of careful judicial analysis, the evils of *Lewellen* continue to spread. In *CSX Transportation, Inc. v. Rabold*,⁷⁹ the court of appeals adopted the misstated rule that "any reference to a right-of-way . . . will cause the deed to be interpreted as conveying only an easement."⁸⁰ Thus, the court interpreted as an easement a deed clearly meant to widen a pre-existing rail corridor in fee simple that was worded as follows:

[The grantors] do hereby convey and warrant . . . the real estate . . .

AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 134 (Lawrence Friedman & Harry Scheiber eds., 1978).

75. *Id.* at 100.

76. *Id.* at 100-01.

77. *Id.* at 101.

78. See *Abandoned Rails*, *supra* note 8 (quoting Nels Ackerson who stated, "The law has always been that a railroad only takes an easement and not title to the land.").

79. 691 N.E.2d 1275 (Ind. Ct. App. 1998).

80. *Id.* at 1278 (quoting *Consolidated Rail Corp. v. Lewellen*, 666 N.E.2d 958, 962 (Ind. Ct. App. 1996)).

described as follows . . . Two additional strips of land . . . located one on each side of the present Right of Way . . . Said additional strips is intended to convey enough land to make a Right of Way One Hundred (100) feet in width . . . TO HAVE AND TO HOLD THE SAME . . . forever.⁸¹

Because the term “right of way” appeared in the deed, the court blindly ignored the entire granting clause that clearly conveyed fee simple and the fact that right-of-way was clearly used in this deed in its descriptive meaning of corridor, not its definitional meaning as an easement. And the court overlooked the fact that the grant was “forever,” another indication of fee simple. This court, citing *Ross*,⁸² stated that distinguishing between granting, habendum, and description clauses is an “over-refinement of the rules of construction.”⁸³ This decision, like *Lewellen*, perpetuates the errors of *Ross* by focusing solely on the key phrase “right-of-way” as though its presence magically defeats all other rules and principles of deed interpretation as well as the unmistakable intent of the parties.

Some further comments about these railroad title issues are pertinent here. First, *Tazian* and *Lewellen* illustrate the impropriety of using class action suits to resolve the competing claims between railroads, successors in interest to the railroads, and adjacent landowners. Because most of these deeds are unique and vary significantly from parcel to parcel, the original grantee railroad’s interests must still be determined on a case-by-case basis in quiet title actions. Class action suits, therefore, serve little purpose but to tie all landowners in court and stall any use of these abandoned corridors.⁸⁴ Creating a class of all adjacent landowners in the entire state serves only to frustrate any development of abandoned corridors, even those with landowners who desire conversion to trails. It also hinders railbanking and corridor preservation policies and provides little protection to landowners while creating a monopoly on attorney fees for class counsel.

Second, the exact role played by the term “right-of-way” has not been settled by the Indiana Supreme Court. In all the cases cited by the parties in which an easement was found, either the term “easement” or “right-of-way” was present in the granting clause of the deed, that is, until *Rabold*. Although such evidence is strong in support of a finding that the grantor intended to convey only an easement, it is certainly not determinative. The term “right-of-way” has two widely-accepted legal meanings, only one of which means an easement.⁸⁵ Two trial court decisions have rejected the arguments of adjacent landowners that the presence anywhere in the deed of the term “right-of-way” magically converts it

81. *Id.* at 1277.

82. *Ross v. Legler*, 199 N.E.2d 346 (Ind. 1964).

83. *Rabold*, 691 N.E.2d at 1278.

84. This harkens back to Judge Posner’s warning about the perils of class action suits. *See* *Mars Steel v. Continental Ill. Nat’l Bank & Trust*, 834 F.2d 677, 678 (7th Cir. 1987).

85. *See* *Joy v. City of St. Louis*, 138 U.S. 1, 44 (1890); *Consolidated Rail Corp. v. Lewellen*, 666 N.E.2d 958, 962-63 (Ind. Ct. App. 1996).

into an easement.⁸⁶ These decisions correctly note, in following *Brown v. Penn Central*, that “reference to a right-of-way in such a conveyance generally leads to its construction as conveying only an easement.”⁸⁷ It does not *always* lead to that conclusion. The importance of the rights at stake should encourage the courts of Indiana to consider all of the relevant factors and rules in deed construction, rather than adopting the 1964 *Ross* court’s opinion that such calculations are “an overrefinement of the rules of construction.”⁸⁸ *Tazian* is an excellent step in moving away from blind results-oriented decision-making and toward thoughtful, legal analysis of the important rights at issue in these cases. Following up on the promise of *Tazian*, however, will require reversing *Rabold*.

Third, the court needs to resolve the interpretive role of the unconstitutional 1987 statute, and its 1995 replacement. It is simply unconscionable to apply the statute when doing so nets the desired result and not when it doesn’t, especially when applied retroactively only for selected issues. Fourth, the court must decide these cases in light of state and federal statutes promoting railbanking and interim trail use.⁸⁹ Although the court in *Lewellen* sidestepped a discussion of the public policies that should be considered when interpreting ambiguous deeds, the importance of corridor preservation has clearly risen to a national priority and should not be frustrated in the name of inconsistent application of outdated anti-railroad precedents.⁹⁰ It is no longer adequate to simply decide all property disputes against the railroads, for doing so raises due process and equal protection concerns. Finally, Judge William Hughes, in the Hamilton Superior Court, set forth an excellent outline of factors that should be weighed in construing nineteenth-century railroad deeds in his order in a Carmel sub-class case.⁹¹ Judge Hughes’ ten principles for evaluating railroad deeds miraculously harmonize all four Indiana Supreme Court decisions discussed herein. Therefore courts faced with a quiet title action regarding railroad deeds should refer to that order. The principles include:

[1] [w]hen interpreting an instrument of conveyance, the Court will look first to the specific wording of the granting clause to determine the object of the conveyance; [2] [t]he interpretation of an instrument of conveyance must consider the instrument in light of the relevant statutes in effect at the time of conveyance; [3] [t]he use of titles such as

86. See Wright, *supra* note 1, at 741 n.91 (citing *Friends of the Pumpkinvine Nature Trail, Inc. v. Eldridge*, No. 20D03-9401-CP-009 (Ind., Elkhart Super. Ct. No. 3) (Sept. 2, 1994) (order granting partial summary judgment)); see also *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties’ motions for partial summary judgment).

87. 510 N.E.2d 641, 644 (Ind. 1987) (emphasis added).

88. *Ross v. Legler*, 199 N.E.2d 346, 351 (Ind. 1964).

89. 16 U.S.C. § 1247(d) (1994); 49 U.S.C. § 10905 (1994).

90. *Consolidated Rail Corp. v. Lewellen*, 682 N.E.2d 779, 784 (1997).

91. *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties’ motions for partial summary judgment).

“Warranty Deed,” “Right of Way Deed,” “Right of Way,” or “Deed of (*grantor*)” is not dispositive of the parties’ intent, but when read in context may provide additional evidence of the parties’ intent; [4] [c]onditions in an instrument of conveyance that require later performance by a party to the conveyance should be construed as covenants running with the land or as conditions subsequent and will not necessarily defeat what is otherwise a clear conveyance of fee simple title; [5] [d]eeds generally contain three important clauses: the granting clause, the *habendum* clause, and the clause identifying the subject of the conveyance—the “descriptive clause”; [6] [r]ailroads were empowered to receive fee simple conveyances of land upon which railroad lines were located both prior to and subsequent to 1905; [7] “upon,” “across,” “through,” “over,” “on” or any other preposition does not create an ambiguity, in and of itself, in a statutory fee simple form deed that clearly grants a strip of land or parcel of real estate with no other limiting language; [8] [t]he term “right-of-way” had dual usages in the [past which] can create confusion in a modern day interpretation of these deeds, and where the Court cannot determine the proper usage of the term, in the context of other deed language, the instrument will be adjudged ambiguous; [9] [i]n construing an instrument of conveyance, the Court must read the entire document in context, giving meaning to every part; [and 10] [i]n construing an instrument of conveyance, the Court will look at the consideration paid by the grantee railroad as providing additional evidence of the parties’ intent.⁹²

Reference to that order should obviate the need for trial judges to reinvent the wheel. In conclusion, the *Tazian* decision shows that the court has finally awakened from its long slumber and will begin to treat all deeds, even railroad deeds, with the serious attention that these property interests require. I therefore urge the court to reverse *Rabold* and continue to provide helpful guidance to the lower courts on deed interpretation so these cases may be put to rest once and for all and rights in these rail corridors may be settled so the dangers and nuisances of abandoned rail beds may be abated.

II. FURTHER DEVELOPMENTS

The courts of appeal also decided some important cases this year in the areas of zoning and eminent domain, landlord/tenant, premises liability, and nuisance. For the sake of brevity, I will summarize a few of the more important ones, but will footnote others of which one should be aware.

92. “The significance of the *granting clause* in deed interpretation has been addressed in Rule 1 above. The *habendum clause* may modify, limit and explain the grant, but it cannot defeat a grant that is expressed in clear and unambiguous language. The *descriptive clause* will not defeat an otherwise clear and unambiguous grant, but a vague or indefinite descriptive clause may be considered as evidence of the parties’ intent when the instrument of conveyance contains other limiting language or is otherwise ambiguous.” *Id.* at 6-17.

A. Easements

In *Gunderson v. Rondinelli*,⁹³ an easement owner appealed from a trial court judgment prohibiting him from erecting and maintaining a boathouse, installing underground electrical cables, operating an all-terrain vehicle, and cutting and piling brush on a non-exclusive easement granted for access to Myers Lake in Marshall County, Indiana.⁹⁴ The court of appeals affirmed the trial court's finding that the language of the deed was sufficiently ambiguous to allow for consideration of extrinsic evidence in determining the intent of the parties.⁹⁵ The deed language provided that "Grantor conveys a non-exclusive easement for ingress and egress to Grantees . . . [a]n easement for lake access, 30 feet in width"⁹⁶ The trial court concluded that the intent of the original parties was to provide solely a pedestrian walkway for access to the lake.⁹⁷ Although evidence had been introduced that prior owners had constructed steps in the easement down to the water, constructed a pier, and used the easement for access to a pontoon boat and a raft, the trial court nevertheless held that "[a]lthough certain activities have taken place that exceeded the intended limits of the easement, all of those activities were with permission, consent, approval, and/or participation by the owners of the servient property. Absent such an agreement, the Defendant is limited to the intended use of the easement."⁹⁸

The court of appeals affirmed the trial court's findings that the intent of the parties was to grant an easement "for walking purposes only."⁹⁹ But the court did not address whether waiver or estoppel would limit the ability of the servient estate owner to induce reliance by, for example, allowing ongoing violations of the easement's terms or by standing by while the easement owner invests large sums of money in improvements that could have been prevented. Although the easement owner's ability to meet the requirements of proving waiver or estoppel is not the issue, it might be the case that the "permission, consent, approval, and/or participation by the owners of the servient property"¹⁰⁰ induced investments and reliance that, in equity, should prevent the servient property owner from revoking his or her permission to exceed the limits of the easement.

In *Hensler v. Brooks*,¹⁰¹ the court considered whether a landowner is subject to a declaratory judgment entered against a predecessor in title which was not recorded. The town of Brooksburg claimed that the Henslers were obstructing the extension of Main and Water streets that were platted in 1843 and which ran

93. 677 N.E.2d 601 (Ind. Ct. App. 1997).

94. *Id.* at 602.

95. *Id.* at 604.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.*

101. 684 N.E.2d 1180 (Ind. Ct. App. 1997).

through the Hensler's property. The trial court ruled that the Henslers were bound by a 1935 declaratory judgment that specified the existence and boundaries of Water and Main Streets through their property.¹⁰² The court of appeals reversed, however, holding that because the judgment was not recorded, the Henslers were not on constructive notice of the judgment, and were therefore bona fide purchasers of the land unencumbered by the road easements.¹⁰³ The court did not address whether the Henslers were on inquiry notice, or whether an implied easement by prior use or prescription could have been found.¹⁰⁴ Rather, the court held that the nineteenth-century plat maps sufficiently established the existence of Main Street, and that continued public use of Water Street supported a finding of a public easement.¹⁰⁵ As *Hensler* illustrates, judicial judgments should be recorded so they do not get omitted from the chain of title.

In an important case outlining the duties of easement owners to the general public, the Indiana Court of Appeals held that Indiana Bell Telephone Co. (Indiana Bell) had a duty to inspect work performed on its behalf on an easement. In *Bala v. City of Indianapolis*,¹⁰⁶ a trenching company working for Indiana Bell had allegedly severed a city sewer line during the process of laying telephone cables and conduits which caused a hole to develop. Mr. Bala fell into the hole and was injured while walking his dog one evening and then sued Indiana Bell. The trial court granted summary judgment in favor of Indiana Bell by relying on the 1989 case of *Sowers v. Tri-County Telephone Co.*¹⁰⁷ In *Sowers*, a tree-trimmer hired by the phone company was injured when he fell into an abandoned manhole while working on the company's easement. The Indiana Supreme Court had denied Mr. Sowers relief on the grounds that the utility company was "not responsible for creating the hole and had no reason to know of its existence."¹⁰⁸ The court of appeals in *Bala* rejected *Sowers* and reversed, noting that "it was not consistent with sound legal and social policy to impose a duty upon the telephone company to inspect all property for which it held easement rights."¹⁰⁹ The court distinguished mere ownership of an easement from control over work being done on an easement stating "it is not inconsistent with sound social and legal policy to recognize a duty upon [easement holders] to inspect work performed on [their] behalf."¹¹⁰ Further, the court of appeals, in reversing the trial court, held that the duty analysis is not "merely a function of a utility's status as easement holder .

102. *Id.* at 1182.

103. *Id.* at 1183.

104. See RESTatement (FIRST) OF PROPERTY § 476 (1944); *Shandy v. Bell*, 189 N.E. 627 (Ind. 1934).

105. *Hensler*, 684 N.E.2d at 1184-85; see also *Beaman v. Smith*, 685 N.E.2d 143 (Ind. Ct. App. 1997) (discussing the statutory requirements for dedicating an easement for a public street).

106. 682 N.E.2d 573 (Ind. Ct. App. 1997).

107. 546 N.E.2d 836 (Ind. 1989).

108. *Bala*, 682 N.E.2d at 575 (citations omitted).

109. *Id.*

110. *Id.* at 576.

. . [r]ather it focuses upon the utility's use of the land."¹¹¹ Because the trencher's negligent work was performed by and for the utility, the court would impose a duty to inspect that work, not by virtue of the utility's status as easement holder, but by virtue of its control over the work being done.¹¹²

It should be pointed out that the courts do not, and probably should not, take identical approaches in dealing with public and private easements. In *Gunderson*, the court strictly construed the private easement to limit the use to exactly what was intended by the parties, with no expansion in light of changed times and conditions. In contrast, the court in *Hensler* was willing to accept the prescriptive rights of the public to create a dedication and in *Bala* the court held an easement owner to have a duty of care toward the general public.¹¹³ *Hensler* and *Bala* show a greater concern for the rights of the general public than for the private easement holder. Ironically, however, when the courts had the opportunity to consider a quasi-public easement to a railroad for conversion to a public recreational trail in *Lewellen*, the rights of the public were completely disregarded in the analysis. Should the courts make a distinction between the public's prescriptive rights to use Water Street in Brooksburg to reach the Ohio River and the railroad's rights to pull up tracks and ties and convert its easement to a hiking and biking trail? I would suggest not. As mentioned above, treating railroads more stringently than other private easement owners and the general public leads only to inconsistencies that cannot be justified on any sound basis.

111. *Id.* at 575.

112. *Id.* at 575-76. This case is principally about premises liability and the duties landowners owe to invitees, licensees, and trespassers. There were quite a number of other premises liability cases this year. *See Strayer v. Covington Creek Condominium Ass'n*, 678 N.E.2d 1286 (Ind. Ct. App. 1997) (condominium owner's suit against the association in a slip and fall case denied in part because the covenants and restrictions applied only to use of the homes, not the common areas); *L.W. v. Western Golf Ass'n*, 675 N.E.2d 760 (Ind. Ct. App. 1997) (rape victim's suit against foundation that sponsored a scholarship which she received denied in part because the landowner and sponsor could not reasonably foresee the likelihood of a criminal assault); *Sheley v. Cross*, 680 N.E.2d 10 (Ind. Ct. App. 1997) (suit by injured motorist alleging that adjoining landowner's crops impaired motorist's view of oncoming traffic denied because landowner did not owe duty to traveling public when landowner's actions were located entirely upon landowner's property and did not spill out into the street); *Carroll v. Jagoe Homes, Inc.*, 677 N.E.2d 612 (Ind. Ct. App. 1997) (holding that genuine issue of material fact existed as to whether property owner was in control of partially constructed house in which child was injured and whether such house constituted attractive nuisance); *McCormick v. State*, 673 N.E.2d 829 (Ind. Ct. App. 1996) (holding that Indiana recreational use statute barred recovery against the Indianapolis Water Company for death of a boater whose boat went over the spillway of Morse Reservoir).

113. *See also Beaman v. Smith*, 685 N.E.2d 143 (Ind. Ct. App. 1997) (holding that a statutory dedication had been effected and a public easement created simply by marking an "easement for future street" in the plat).

B. Landlord/Tenant

A reminder that Indiana is in an at-will state came in *Stout v. Kokomo Manor Apartments*,¹¹⁴ in which the court of appeals affirmed the eviction of a woman and her thirteen-year-old son from their FmHA subsidized apartment on a series of technicalities, never reaching the merits of her case. Ms. Stout was evicted upon an allegation that her son had caused a breach of the anti-“criminal activity” provision of her lease by allegedly molesting a young child in the complex. Ms. Stout filed a demand for a jury trial and a counter-claim against her landlord. Stout claimed that her son’s actions did not amount to “criminal activity” because at most it was an act of juvenile delinquency and juvenile proceedings are civil, not criminal.¹¹⁵ The court agreed that it was not a criminal activity *per se*, but that the term “criminal activity” in the lease did not mean that a crime must have been committed.¹¹⁶ The court concluded that “the parties cannot reasonably have entered into the agreement with the intention that ‘criminal activity’ be avoided but any and all forms of delinquent activity be accepted. The evidence therefore is sufficient to support the determination that the act of molestation qualified as ‘criminal activity’ as provided in the lease agreement.”¹¹⁷ The court offered no principled distinction between criminal activity and juvenile delinquency, leaving us to wonder if skipping school, writing on bathroom walls, or spitting on the sidewalk could be grounds for eviction as well.

In support of its ruling, the court relied on arguably hearsay evidence that the son had admitted the act of molestation, and evidence that arguably violated section 31-6-8 of the Indiana Code on confidentiality provisions for juvenile proceedings.¹¹⁸ Ms. Stout was denied a jury trial because she failed to demand one within ten days of the filing of the complaint in the small claims division of the superior court. Nor did she file the required ten dollars to transfer the claim to the plenary docket or ask for leave to proceed without payment of the deposit. After this series of missteps by Ms. Stout and/or her attorney, the court summarized that

[i]nsofar as Stout did not establish her indigency or request leave to proceed without payment of the deposit, she prevented the possibility of a transfer of her case to the plenary docket for a trial by jury. Similarly, by her inactions, Stout permitted the case to proceed on the small claims docket under its informal procedural and evidentiary rules.¹¹⁹

As a result of her delay, the landlord’s claim remained “informal, with the sole objective being to dispense speedy justice.”¹²⁰ In fact, it was so speedy and

114. 677 N.E.2d 1060 (Ind. Ct. App. 1997).

115. *Id.* at 1064.

116. *Id.*

117. *Id.* at 1065.

118. *See id.* at 1063-64.

119. *Id.* at 1067.

120. *Id.* at 1068.

informal, that because the “record does not demonstrate that Stout asked the trial court for any relief from the Landlord’s retention of her pre-paid rent or her security deposit . . . Stout may not proceed against the landlord on this issue for the first time on appeal.”¹²¹ This case is particularly troubling. Although we all recognize the importance of summary eviction proceedings, should Ms. Stout not only lose her apartment, but her housing subsidy as well because she failed to pay the ten dollar fee within ten days that would have moved her case to the plenary docket where standard rules of evidence would have applied?¹²²

C. *Life Estates*

The Indiana Court of Appeals faced a particularly tricky case after Anna Ellerbusch granted a remainder interest in her house and eighty-eight acres to her sons, reserving a life estate in herself.¹²³ Ms. Ellerbusch had procured an insurance policy on the house which she paid for out of her own personal funds. In 1995, the house was completely destroyed by fire and Ellerbusch was compensated by her insurer for the fair market value of the home. However, she did not use the proceeds to repair or rebuild the house. A year later, one of the remaindermen sued Ellerbusch seeking damages for loss in value to the property and requesting that the court order her to hold the remainderman’s share of the insurance proceeds in a constructive trust. The trial court granted summary judgment for Ellerbusch, and the remainderman appealed.¹²⁴ The court of appeals affirmed, adopting the majority rule that a life tenant, who “insures the property in his own name and for his own benefit and pays the premiums from his own funds, . . . is entitled to the entire proceeds of the insurance upon a loss to the property, even if the insurance covers the full worth of the property.”¹²⁵ The court noted several minority rules which state that if the life tenant “recovers insurance proceeds that exceed the value of the life estate, then the tenant must hold the excess in trust for the benefit of the remaindermen . . .” and that “insurance proceeds collected by the life tenant . . . stand in place of the

121. *Id.*

122. *Id.* at 1065. And even if the trial had been procedurally fair, is eviction the proper response to a 13-year-old child’s “sexual orientation problems” rather than medical treatment? Stout argued her son had “sexual orientation problems,” and that the charge of molestation against him caused an “impairment” which should be a “handicap” meriting protection against housing discrimination under the Fair Housing Act. The court rejected this argument, stating the son’s action “qualifie[d] him] as a ‘direct threat to the health or safety of other individuals’ [and thus] the ‘disability’ of Stout’s son [is not protected].” *Id.*

123. Ellerbusch v. Myers, 683 N.E.2d 1352 (Ind. Ct. App. 1997).

124. *Id.* at 1353-54.

125. *Id.* at 1354 (citations omitted). This rule is subject to three exceptions: if the instrument creating the estate expressly provides differently, if the life tenant and remaindermen agree, or if a fiduciary relationship exists between the parties. *Id.* None of these exceptions applied in this case. *Id.* at 1355.

destroyed property and must be used to rebuild the property.”¹²⁶ The court, with no discussion, adopted the majority rule explaining that a contract of insurance is a personal contract and “inures to the benefit of the party with whom it is made and by whom the premiums are paid.”¹²⁷ Since Ellerbusch was not required to insure the property for the remainderman’s benefit, she would not be required to hold the insurance proceeds in trust for them either.

Clearly, this is a dangerous rule. If a life tenant can insure her tenancy for full market value, and recover and keep the full market value without rebuilding after a loss, she has converted a part of the remainderman’s interest. Because the remaindermen now receive the fire-scorched land and the remains of a building, their estate has suffered. The life tenant walks away with monetary compensation greater than the value of her life estate. The remaindermen’s property has been damaged and their only recourse is against the life tenant’s estate in an action for waste. But just as we allow the remaindermen to bring an action in waste prior to the determination of the life estate to prevent further destruction of the remaindermen’s interest, so too should the remaindermen be able to attach a portion of the insurance proceeds to insure that the life tenant will have suitable assets to pay a judgment. While Ellerbusch may purchase insurance for the full market value of the estate, her life estate is worth less than the full market value of the property. If she cannot sell unencumbered title to the entire estate without the remaindermen’s participation, she should not be able to destroy the property and keep the full insurance proceeds without being liable to the remaindermen for their damaged estate. Any other rule encourages the life estate holder to get full market value through insurance fraud which he or she could not obtain on the open market.¹²⁸

D. Rule Against Perpetuities

There was a really complicated Rule Against Perpetuities case that came out of the court of appeals this year. *Wedel v. American Electric Power Service Corp.*¹²⁹ involved an agreement for royalties in exchange for coal options (overriding royalty interest in coal),¹³⁰ and whether such an interest was an interest in property that would be subject to the rule against perpetuities. In *Wedel*, the court determined that the 1970 royalty agreement between Mr. Beshear¹³¹ and American Electric Power Services Corporation (AEP) were

126. *Id.*

127. *Id.* (quoting 51 AM. JUR. § 158 (1970)).

128. I am certainly not implying that Mrs. Ellerbusch committed insurance fraud. My only concern is that such a rule, without strict protections for the remaindermen, would encourage insurance fraud.

129. 681 N.E.2d 1122 (Ind. Ct. App. 1997).

130. An overriding royalty interest has been defined as: “a royalty interest in minerals located on property that the royalty holder (i.e., grantee) does not actually own.” *Id.* at 1133 (quoting *Commerce Bank v. Peabody Coal Co.*, 861 S.W.2d 569, 572 n. 4 (Mo. Ct. App. 1993)).

131. Beshear died before completion of this suit and was replaced by the executor of his

interests in property that would be subject to the rule against perpetuities and were not merely contract rights.¹³² Under the agreement, Beshear could elect to receive advance royalty payments for coal covered by various options.¹³³ Beshear had made elections regarding four different types of property interests: 1) acreage Beshear obtained prior to the original agreement; 2) acreage obtained by Beshear on behalf of AEP; 3) acreage acquired independently by AEP; and 4) acreage not acquired by AEP but within the limits of the coal field.¹³⁴ Beshear elected royalties on coal in the first two categories and part of the third under an agreement that required him to either elect advance royalties within five years after AEP exercised its options or wait to receive royalties on coal actually mined.¹³⁵ The court held that Beshear's interests in royalties in the first two categories had vested in interest under the contract which gave him a five-year and an eight-year window within which to elect royalties or the options would be reassigned.¹³⁶ These two interests, therefore, had vested within the necessary period, and were not void.

The court then held that Beshear's interest in the category three options were extinguished by operation of the contract for those options on which he did not previously elect advance royalties.¹³⁷ Additionally, his interest in the category four options were extinguished by the rule against perpetuities because they were nonvested.¹³⁸ The court held, in sum, that "overriding or nonparticipating royalty interests are real property interests which vest immediately in the royalty holder only to the extent that such interests are granted in property owned by the grantor at the time of conveyance, otherwise such royalty interests will not vest until acquisition by the grantor."¹³⁹ This was a case of first impression in Indiana with regard to overriding royalty interests, and the court adopted the rule that property rights that are vested in interest, as well as those that are vested in possession, will not be subject to the rule against perpetuities.¹⁴⁰ Because mineral interests are considered real property, they are vested in interest when the right to future enjoyment is fixed.¹⁴¹ As it turned out, the royalty agreements provided an election period during which the options would become vested in interest; had they not, the options would have been subject to the rule against perpetuities.

estate, Wedel.

132. *Wedel*, 681 N.E.2d at 1132.

133. *Id.* at 1128-29.

134. *Id.* at 1133.

135. *Id.* at 1128-29, 1133-34 & n.10.

136. *Id.* at 1133-34.

137. *Id.* at 1135.

138. *Id.*

139. *Id.* at 1137-38.

140. *Id.* at 1132.

141. *Id.* at 1132-33.

E. Subjacent Support

Unless you live in California where the land is constantly sliding around, burning up, or caving in, I'll bet you never thought you'd actually encounter a subjacent support case once you sold that property casebook to some unsuspecting first-year. But in coal-mining Indiana, one can encounter some really pithy issues. In *Haseman v. Orman*,¹⁴² a group of property owners noticed structural damage to their homes and depressions in their property, the result of subsidence from subterranean coal mining. They filed suit against the owner and lessee of the subsurface mineral rights claiming a breach of their absolute duty to provide the surface owners with subjacent support. The trial court found the owner and lessee strictly liable for the damage. The court based its decision on the 1901 case, *Paull v. Island Coal Co.*,¹⁴³ which restated the well-established rule that "an absolute duty exists on the part of the owners of mineral rights to provide subjacent support for the owners of surface rights."¹⁴⁴ The court of appeals in *Haseman* affirmed the lessee's liability, but reversed the finding of strict liability against the owner of the mineral rights.¹⁴⁵ In qualifying the *Paull* rule, the court of appeals ruled that the "owner or possessor of this land is not liable under the rule . . . unless he was an actor in the withdrawal of support."¹⁴⁶ Strict liability usually imposes liability regardless of fault or participation. However, the court of appeals determined that the underlying reason behind strict liability is to impose liability on the party in the best position to bear the loss, which in this case was the lessee not the absentee owner.¹⁴⁷ Additionally, the court would not find an independent liability under negligence principles because *Haseman* was only a passive lessor of the mineral rights and, "as a result, did not assume a duty to the Ormans"¹⁴⁸ because he was not in control of the mining operations. But if a surface owner has an absolute right to subjacent support, is that right compromised by restricting liability to a cost/benefit analysis of those best able to bear the risk? Under such a rule, what incentive is there on the part of the owner to negotiate a lease that protects the rights of unsuspecting surface owners?

Fortunately, the Indiana Supreme Court vacated the court of appeals' decision.¹⁴⁹ Justice Boehm noted that although Indiana had not ruled on whether a lessor of mineral rights is subject to strict liability (along with the lessee) for subsidence, the lessor was in a better position than surface rights owners to

142. 680 N.E.2d 531 (Ind. 1997).

143. 88 N.E.2d 959 (Ind. App. 1909).

144. *Haseman v. Orman*, 660 N.E.2d 1041, 1044 (Ind. Ct. App. 1996).

145. *Id.* at 1045.

146. *Id.* at 1044-45 (quoting RESTATEMENT (SECOND) OF TORTS § 820 cmt. g (1977)).

147. *Id.* at 1045 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984)).

148. *Id.*

149. *Haseman*, 680 N.E.2d at 532.

“require financial responsibility of his lessee.”¹⁵⁰ Additionally, Justice Boehm stated that “[i]t would be fundamentally unfair to allow Haseman to profit from his lessee’s activities and then wash his hands of any liability by hiding behind the lease.”¹⁵¹ Consistent with rules on duty of care and imposition of liability on the party best able to prevent loss, Justice Boehm declared that “the mineral owner’s duty to provide subjacent support cannot be extinguished by a lease of mineral rights unless a separate contract with the surface estate holder so provides.”¹⁵² In effect, the court correctly imposed the duty on the party who benefitted from the activity rather than on the innocent bystander who was not a party to the lease transaction.

F. Zoning

There were quite a number of zoning cases this year, most having to do with whether zoning variances were justifiably denied.¹⁵³ Other cases concerned alterations to businesses operating under legal non-conforming use status,¹⁵⁴ and petitions for mandamus ordering approval of zoning variances or plats or issuance of permits.¹⁵⁵ But one case stands out as having presented a particularly thorny issue. In *Schlehuser v. City of Seymour*,¹⁵⁶ Donn Schlehuser appealed the City of Seymour BZA’s revocation of two zoning variances that had been granted to him in 1993 to open an automotive repair shop. The City of Seymour petitioned the BZA to revoke Schlehuser’s variances because, it alleged, he was not in compliance with the conditions of the variances. Schlehuser obtained a temporary restraining order to prevent authorities from taking action on the petition, but it was subsequently rescinded and the BZA revoked his variances. In 1995, he petitioned the trial court for a writ of certiorari alleging that the

150. *Id.* at 536.

151. *Id.* at 535.

152. *Id.* at 536.

153. *Crooked Creek Conservation & Gun Club v. Hamilton County North Bd. of Zoning Appeals*, 677 N.E.2d 544 (Ind. Ct. App. 1997) (holding BZA was within the scope of its discretion in denying special exception to zoning ordinance for gun club); *Irving Materials, Inc. v. Board of Comm’rs*, 683 N.E.2d 260 (Ind. Ct. App. 1997) (holding that county had authority to require special exception for mineral extraction in a flood plain).

154. *Deja Vu of Hammond, Inc. v. City of Lake Station*, 681 N.E.2d 1168 (Ind. Ct. App. 1997) (distinguishing between extension and enlargement of non-conforming uses by adult entertainment business that expanded its premises); *Ragucci v. Metropolitan Dev. Comm’n*, 685 N.E.2d 104 (Ind. Ct. App. 1997) (holding in case of first impression, that increase in the number of apartments without altering size of apartment building, was permissible under legal non-conforming use).

155. *Brant v. Custom Design Constructors Corp.*, 677 N.E.2d 92 (Ind. Ct. App. 1997) (reversing trial court for ordering mandamus without sufficiently considering all elements in the ordinance); *Yater v. Hancock County Bd. of Health*, 677 N.E.2d 526 (Ind. Ct. App. 1997) (affirming denial of septic permits to developers when stricter regulations went into effect).

156. 674 N.E.2d 1009 (Ind. Ct. App. 1996).

BZA's actions were ultra vires, violated the BZA's own rules, and violated his constitutional rights. After oral argument, the court denied his petition and concluded that the BZA had the power to reconsider and revoke a variance that it had previously issued.¹⁵⁷ The court of appeals agreed with Schlehuser that his writ of certiorari should have been granted.¹⁵⁸

Whether a BZA can revoke a variance absent an express grant of that authority is an issue of first impression in Indiana. The court held that if the BZA has an express statutory grant of authority to reconsider and revoke a variance, it certainly may do so.¹⁵⁹ Absent such an ordinance, there must be some safeguards to insure that a zoning board does not act arbitrarily, especially when the recipient has relied on the variance and has invested heavily.¹⁶⁰ Thus, the court held that "the authority to revoke a variance is not inherent in the BZA's statutory powers to grant and deny a variance."¹⁶¹ But where a variance is granted subject to certain conditions, if those conditions are adequately spelled out, the variance may be revoked if the conditions are not met.¹⁶² Furthermore, restrictions must "be constitutional and may not themselves exceed the scope of authority delegated to the BZA by the relevant ordinance or statute."¹⁶³ The court held that any conditions placed on a zoning variance should "1) not offend any provision of the zoning ordinance; 2) require no illegal conduct on the part of the permittee; 3) be in the public interest; 4) be reasonably calculated to achieve a legitimate objective of the zoning ordinance; and 5) impose no unnecessary burdens on the landowner."¹⁶⁴ Moreover, the landowner must receive notice and have a meaningful opportunity to be heard before the variance can be revoked.¹⁶⁵ This case affirms the well-established rule that zoning variances are not permanently written in stone. However, reasonable conditions and restrictions placed on landowners must be clearly articulated, and landowners must be given notice and an opportunity to be heard, before the variance will be revoked.

CONCLUSION

This survey period was important with regard to property issues. Although many of the cases did not present startlingly new fact situations or technical legal quibbles, the courts continued to make inroads in refining and expanding current

157. *Id.* at 1012.

158. *Id.*

159. *Id.* at 1013. The court noted the quasi-judicial function of the BZA, in that the BZA "generally has no inherent power to review and vacate, rescind or alter its decision after it has been made." *Id.* at 1014.

160. *Id.* at 1013.

161. *Id.* at 1014.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

principles. There are a few cases that left doubts in the minds of many readers as to their logic, consistency, or fairness, but many reaffirmed traditional property rules in ways that protected settled expectations.

The courts did find themselves on the cusp of an important legal issue, one that requires careful attention to precedents, doctrines, and principles of equity. The railroad title cases will continue to plague the courts until consistent and fair principles of deed construction have been well-established. The courts are well on their way to doing exactly that, and 1998 should be a productive year in that regard. Indiana is out of step with virtually every state court on these issues,¹⁶⁶ not because we are different, but because our judiciary has not given them the attention they deserve. But now is the time to do so, for Indiana cannot afford to lose the valuable and irreplaceable railroad corridors that constitute our national heritage.

166. See Wright, *supra* note 1.

1997 DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

Both the 110th Indiana General Assembly and the Indiana Tax Court contributed to the 1997 changes and clarifications to all of the major and many of the minor Indiana tax laws. This Article highlights the more interesting 1997 developments for the period of October 1, 1996 through September 30, 1997.¹

I. GENERAL ASSEMBLY LEGISLATION

There were hundreds of 1997 legislative changes which impacted Indiana taxation, many of which had a direct effect on both broad and narrow segments of Indiana residents. Many of the changes were attempts to fine-tune existing laws, but significant policy changes surfaced in the following major areas: state offices and administration; income tax; sales and use tax; property tax; and death taxes.

The general assembly enacted into law three bills which had an impact on state offices and administration. The first of these allows a person that holds a beer wholesaler permit, liquor wholesaler permit, or wine wholesaler permit to qualify for the benefits of an enterprise zone.² This law also allows a person who holds an alcoholic beverage permit and who receives at least 60% of the person's annual revenue from retail food sales to qualify for the benefits of an enterprise zone.³ Second, the general assembly enacted legislation which provides that individuals may establish individual development accounts and can deposit up to \$300 of their own funds to the account with a match from the State of Indiana equal to another \$900 per year.⁴ Further, interest earned on the account is exempt from taxation as is any money deposited by the state and withdrawn to be used for: costs of higher education; accredited licensed training program; purchase of a residence; or, starting a business.⁵ Finally, House Bill 1784⁶ clarifies that letters of findings issued by ISDR are to be printed in the Indiana Register.⁷

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1. The following abbreviations are frequently used in this Article: Indiana Department of State Revenue (IDS) and Indiana State Board of Tax Commissioners (ISBTC). Also, the Indiana General Assembly is referred to as "general assembly."

2. IND. CODE § 4-4-6.1-1.7 (Supp. 1997) (retroactive to July 1, 1995).

3. *Id.*

4. *Id.* § 4-4-28-9, -12 (effective July 1, 1997).

5. *Id.* § 4-4-28-14, -16 (effective July 1, 1997).

6. H.R. 1784, 110th Leg., 1st Reg. Sess. § 1 (Ind. 1997) (effective Jan. 1, 1998).

7. IND. CODE §§ 4-22-7-7, 6-8.1-3-3.5 (Supp. 1997).

In the area of income taxation, the general assembly enacted into law two bills which contain five key provisions.⁸ The first provision clarifies the definition of receipts to include a limited liability company that is not itself a taxpayer as defined in section 6-2.1-1-16(27) of the Indiana Code.⁹ Second, for gross income tax purposes, the general assembly included limited liability companies in the definition of taxpayer, but excluded those that have only a single member and are disregarded as entities for federal income tax purposes.¹⁰ The third provision clarifies the definition of membership fees for not-for-profit organizations so that fees charged for use of golf, tennis, swimming, or other athletic facilities are not subject to gross income tax.¹¹ Fourth, the general assembly provided that after December 31, 1997, payments of estimated gross income tax will be made by electronic funds transfer¹² if the current year's quarterly estimated liability or the preceding year's average quarterly liability exceeds \$10,000¹³ rather than \$20,000 as in the past. Also, the quarterly corporate payment dates established in 1994 were made permanent.¹⁴ Fifth, the changed legislation provides that the quarterly remittance of gross income tax on the sales of real estate which is remitted by the county treasurer to the IDSR shall be made by electronic funds transfer¹⁵ if the average monthly amount due for the preceding year exceeded \$10,000.¹⁶

In the area of sales and use taxation, the general assembly enacted into law three bills which contain eight key provisions.¹⁷ The first of these provides that when an individual wants to title a vehicle, the individual must present documentation sufficient to rebut the presumption that the price was the average price for that vehicle as determined in a used vehicle buying guide and to establish the actual selling price of the vehicle.¹⁸ Second, the general assembly provided an exemption from the sales tax for prescription drug and insulin drug samples and the packaging and literature for drug samples.¹⁹ The third change provides a sales tax exemption for the lease or purchase of any rail transportation equipment, as well as spare, replacement, and rebuilding parts or accessories,

8. H.R. 1784, 110th Leg., 1st Reg. Sess. §§ 3, 4, 7 (Ind. 1997); S. 6, 110th Leg., 1st Spec. Sess. § 50 (Ind. 1997).

9. IND. CODE § 6-2.1-1-10 (effective July 1, 1997).

10. *Id.* § 6-2.1-1-16 (retroactive to July 1, 1993).

11. *Id.* § 6-2.1-3-21 (effective May 13, 1997).

12. Personal or overnight courier delivery of payment by cashier's or certified check or money order is also acceptable.

13. IND. CODE § 6-2.1-5-1.1 (Supp. 1997) (effective July 1, 1997).

14. *Id.*

15. Personal or overnight courier delivery of payment by cashier's or certified check or money order is also acceptable.

16. IND. CODE § 6-2.1-8-5 (Supp. 1997) (effective July 1, 1997).

17. H.R. 1784, 110th Leg., 1st Reg. Sess. §§ 8-9, 11-12 (Ind. 1997); H.R. 1829, 110th Leg., 1st Reg. Sess. §§ 1-3 (Ind. 1997); S. 5, 110th Leg., 1st Spec. Sess. §§ 37-38 (Ind. 1997).

18. IND. CODE § 6-2.1-3-6 (effective Jan. 1, 1998).

19. *Id.* § 6-2.5-5-19.5 (retroactive to Jan. 1, 1997).

components, materials, or supplies, including lubricants and fuels, for rail transportation equipment.²⁰ It also provides that the IDSR shall cancel and shall no longer issue proposed assessments against any person for sales or use tax on rail transportation equipment.²¹ Fourth, the general assembly deleted archaic language that phased in the sales tax exemption for pollution control equipment.²² The fifth modification provides that if an education service center sells qualified computer equipment to parents or guardians of students enrolled in grades one through twelve, the computer equipment sold will be exempt from the sales tax.²³ Sixth, the general assembly provided that the value of an owned vehicle is exempt from the sales tax in a vehicle lease transaction when the vehicle is exchanged for a like kind vehicle.²⁴ Seventh, one key provision lowers the threshold amount requiring remittance of sales tax by electronic funds transfer²⁵ from \$20,000 to \$10,000.²⁶ Eighth, the general assembly deleted archaic language that describes the phase in of the collection allowance for the sales tax.²⁷

In the area of adjusted gross income tax, the general assembly enacted into law five bills which contain ten key provisions.²⁸ The first provision increases the deduction for certain dependent children of a taxpayer from \$1000 to \$1500 for the years 1997 through 2000.²⁹ Second, the general assembly changed all references to the Internal Revenue Code to refer to it as it was in effect on January 1, 1997.³⁰

Third, the general assembly provided that the Indiana source income of professional sports team members who are nonresidents be determined in accordance with section 6-3-2-2.7 of the Indiana Code.³¹ Fourth, the general assembly allocated the income of nonresident professional athletes based on their duty days in the taxable year.³² The provision excludes signing bonuses meeting certain conditions from the allocation factor.³³ It uses total salaries and

20. *Id.* § 6-2.5-5-27.5 (effective May 8, 1997).
21. H.R. 1829, 110th Leg., 1st Reg. Sess. § 3 (Ind. 1997) (effective May 8, 1997).
22. IND. CODE § 6-2.5-5-30 (Supp. 1997) (effective Jan. 1, 1998).
23. *Id.* § 6-2.5-5-38.1 (effective July 1, 1997).
24. *Id.* § 6-2.5-5-38.2 (effective July 1, 1997).
25. Personal or overnight courier delivery of payment by cashier's or certified check or money order is also acceptable.
26. IND. CODE § 6-2.5-6-1(f) (Supp. 1997) (effective Jan. 1, 1998).
27. *Id.* § 6-2.5-6-10(b) (effective Jan. 1, 1998).
28. H.R. 1777, 110th Leg., 1st Reg. Sess. §§ 2-3 (Ind. 1997); H.R. 1781, 110th Leg., 1st Reg. Sess. §§ 2-3 (Ind. 1997); H.R. 1784, 110th Leg., 1st Reg. Sess. §§ 15-16 (Ind. 1997); S. 6, 110th Leg., 110th Leg., 1st Spec. Sess. § 51 (Ind. 1997); S. 170, 110th Leg., 1st Reg. Sess. §§ 1-3 (Ind. 1997).
29. IND. CODE § 6-3-1-3.5(a) (retroactive to Jan. 1, 1997).
30. *Id.* § 6-3-1-11 (retroactive to Jan. 1, 1997).
31. *Id.* § 6-3-2-2 (effective Jan. 1, 1998).
32. *Id.* § 6-3-2-2.7 (effective Jan. 1, 1998).
33. *Id.* § 6-3-2-2.7(a)(1)(B), (a)(6).

performance bonuses times a duty day allocation fraction in which the numerator is the number of Indiana duty days³⁴ and the denominator is the number of total duty days in a taxable year.³⁵ The law also provides for the establishment of a method so a team may file a composite return on behalf of all players and staff required to file.³⁶ In the fifth change, the general assembly provided that a team member that is covered by a composite return filed in accordance with section 6-3-2-2.7 of the Indiana Code is not required to file an individual return.³⁷

Sixth, the general assembly provided that if a taxpayer takes a federal deduction from adjusted gross income for a medical care savings account, then the taxpayer is prohibited from taking an additional Indiana exemption for a medical care savings account.³⁸ The seventh change provides an earned income tax deduction for taxpayers with dependent children.³⁹ The deduction is allowed if 80% of the taxpayer's total income is earned income and the taxpayer has at least one dependent child and total Indiana income of less than \$12,000.⁴⁰ The allowed deduction is \$12,000 minus the taxpayer's total Indiana income.⁴¹ The provisions also require that a husband and wife file a joint or separate return consistent with the federal income tax return(s) they file.⁴² The deduction is permitted for taxable years 1997 through 2000 only.⁴³

Eighth, the general assembly provided that after December 31, 1997, the threshold amount for requiring that quarterly adjusted gross income tax payments by corporations be remitted by electronic funds transfer⁴⁴ was lowered from \$20,000 to \$10,000.⁴⁵ The change also provides that the quarterly payment dates established in 1994 are permanent.⁴⁶ Ninth, the general assembly also lowered the threshold amount which requires monthly employer withholding of employee taxes to be remitted by electronic funds transfer⁴⁷ from \$20,000 to \$10,000.⁴⁸ Tenth, the general assembly enacted legislation which requires river boat operators to withhold from winnings Indiana adjusted gross income tax whenever

34. *Id.* § 6-3-2-2.7(a)(2).

35. *Id.* § 6-3-2-2.7(b).

36. *Id.* § 6-3-2-2.7(d)(2).

37. *Id.* § 6-3-4-1 (effective Jan. 1, 1998).

38. *Id.* § 6-3-2-18(g) (effective Jan. 1, 1998).

39. *Id.* § 6-3-2.5-1 (retroactive to Jan. 1, 1997).

40. *Id.* § 6-3-2.5-6.

41. *Id.* § 6-3-2.5-7.

42. *Id.* § 6-3-2.5-8.

43. *Id.* § 6-3-2.5-1.

44. Personal or overnight courier delivery of payment by cashier's or certified check or money order is also acceptable.

45. IND. CODE § 6-3-4-4.1 (Supp. 1997) (effective July 1, 1997).

46. *Id.*

47. Personal or overnight courier delivery of payment by cashier's or certified check or money order is also acceptable.

48. IND. CODE § 6-3-4-8.1(d) (Supp. 1997) (effective Jan. 1, 1998).

the operator is required to withhold from federal income tax.⁴⁹

In the area of tax credits, the general assembly enacted into law five bills which contain eleven key provisions.⁵⁰ The first of these provisions increases the maximum value of neighborhood assistance credits from \$1.5 million to \$2.5 million per fiscal year.⁵¹ Second, the general assembly provided that the computer donation tax credit shall be \$100 instead of the current \$125.⁵² The third provision permits education service centers to sell computers to the parents or guardians of school children enrolled in computer education programs, if the computer will be used by the child for educational purposes.⁵³ Fourth, the general assembly removed the prohibition against the service center selling a computer for more than \$500 and added a provision allowing the service center to include a reasonable allowance for operating overhead with the center's operating expenses in purchasing, inspecting, testing, and refurbishing the computer equipment when calculating the resale price.⁵⁴ Fifth, the general assembly deleted the requirement that when the board of education performs an annual review of the program, the review report include the board's recommendation regarding the continuation of the program and tax credits.⁵⁵

Sixth, the general assembly defined a taxpayer for purposes of the historic preservation tax credit as an individual, corporation, S corporation, partnership, limited liability company, limited liability partnership, nonprofit organization, or joint venture.⁵⁶ Seventh, the general assembly clarified that a pass through entity is eligible for the historic preservation tax credit by eliminating the county-size restriction.⁵⁷ The eighth provision removes the requirement that a facility must have 2000 square feet on the ground floor, eliminates a requirement for prior approval from the division of historic preservation, and requires the expenditure to exceed \$10,000 instead of \$5000.⁵⁸ Ninth, the general assembly increased the maximum credit for fiscal year 1998 and fiscal year 1999 to \$750,000.⁵⁹ This amount reverts to \$450,000 for years beginning after June 30, 1999.⁶⁰

Tenth, the general assembly provided an individual development account tax

49. *Id.* § 6-3-4-8.2 (effective Jan. 1, 1998).

50. H.R. 1425, 110th Leg., 1st Reg. Sess. § 2 (Ind. 1997); H.R. 1570, 110th Leg., 1st Reg. Sess. § 1 (Ind. 1997); H.R. 1633, 110th Leg., 1st Reg. Sess. §§ 2-5 (Ind. 1997); H.R. 1777, 110th Leg., 1st Reg. Sess. § 1 (Ind. 1997); S. 375, 110th Leg., 1st Reg. Sess. §§ 2-5 (Ind. 1997).

51. IND. CODE § 6-3.1-9-5(a) (effective July 1, 1997).

52. *Id.* § 6-3.1-15-8 (effective July 1, 1997).

53. *Id.* § 6-3.1-15-12 (effective July 1, 1997).

54. *Id.* § 6-3.1-15-13 (effective July 1, 1997).

55. *Id.* § 6-3.1-15-17 (effective July 1, 1997).

56. *Id.* § 6-3.1-16-6.1 (effective July 1, 1997).

57. *Id.* § 6-3.1-16-7.5 (effective July 1, 1997).

58. *Id.* § 6-3.1-16-8 (effective July 1, 1997).

59. *Id.* § 6-3.1-16-14 (effective July 1, 1997).

60. *Id.*

credit.⁶¹ The credit is equal to 50% of the contribution if it is not less than \$1000 and not more than \$50,000.⁶² The provision provides that the credit applies to pass through entities.⁶³ A contribution that will result in a tax credit must be pre-approved by the IDSR.⁶⁴ Upon notification of approval, the taxpayer has thirty days to make the contribution.⁶⁵ The credit is limited to \$500,000 in any state fiscal year.⁶⁶ Eleventh, the general assembly increased the homestead credit to 10% for years 1998 through 2001.⁶⁷ After 2001, the credit decreases to 4%.⁶⁸

In the area of property tax, the general assembly enacted into law a single bill which affects procedures for the collection of Indiana property taxes.⁶⁹ The modifications include an imposition of sole liability for the property taxes on the owner of real property that is held, possessed, controlled, or occupied by another person.⁷⁰ They also eliminate the property tax payment responsibility of a person who holds, possesses, controls, or occupies, but does not own the real property, unless the person is liable for the taxes pursuant to a lease or contract recorded with the county recorder before January 1, 1998.⁷¹ Also, an owner of real property that has an improvement or appurtenance which is assessed as real property and is owned, held, possessed, controlled, or occupied by a person other than the landowner, is jointly liable for the taxes on the improvement or appurtenance with the person holding, possessing, controlling, or occupying it.⁷² The changes further require that real property and any improvement or appurtenance on the real property held, possessed, controlled, or occupied by a person other than the real property owner must be listed and assessed as a single unit, unless the improvement or appurtenance is held, possessed, controlled, or occupied pursuant to a lease or contract recorded with the county recorder before January 1, 1998. The modifications also allow an owner to require that several contiguous parcels in the same taxing district be combined into a single parcel for property tax purposes;⁷³ require the consolidation of contiguous parcels when an improvement is located on or significantly affects the parcels;⁷⁴ and, require an owner to pay or otherwise satisfy all property taxes that are due and owing before transferring an interest in real property that consists of a parcel subdivided

61. *Id.* § 6-3.1-18 (effective Jan. 1, 1998).

62. *Id.* § 6-3.1-18-6.

63. *Id.* § 6-3.1-18-7.

64. *Id.* § 6-3.1-18-9.

65. *Id.*

66. *Id.* § 6-3.1-18-10.

67. *Id.* § 6-1.1-20.9-2(d) (effective Jan. 1, 1998).

68. *Id.*

69. H.R. 1487, 110th Leg., 1st Reg. Sess. (Ind. 1997).

70. IND. CODE § 6-1.1-2-4(a) (Supp. 1997) (effective Jan. 1, 1998).

71. *Id.*

72. *Id.* § 6-1.1-2-4(b) (effective Jan. 1, 1998).

73. *Id.* § 6-1.1-5-16 (effective July 1, 1997).

74. *Id.*

from a larger parcel or a parcel that is created from several existing parcels.⁷⁵

In the area of local option taxes, the general assembly enacted into law three bills which contain eight key provisions.⁷⁶ The first of these provisions permits a county having a population between 107,000 and 108,000, Laporte County, to adopt an increase in the County Economic Development Income Tax (CEDIT) in the same year that the county decreases the County Adjusted Gross Income Tax (CAGIT) if the CEDIT rate plus the CAGIT rate is less than the CAGIT rate in effect before the adoption of an ordinance decreasing the CAGIT rate.⁷⁷ Second, the general assembly also permitted Laporte County to adopt CEDIT if it reduced its CAGIT rate in 1997.⁷⁸ Third, the general assembly made a technical change in CAGIT in cross referencing back to adjusted gross income tax definitions.⁷⁹ Fourth, the general assembly required that members of an income tax council must vote on any ordinance to change the County Option Income Tax (COIT), instead of the presumption that if a member does not vote, then it is considered a no vote.⁸⁰ Fifth, the general assembly provided that an ordinance to rescind COIT in a county must be adopted by April 1 of the year instead of June 1 as previously required.⁸¹ Sixth, the general assembly made a technical change in COIT in cross referencing back to adjusted gross income tax definitions.⁸² Seventh, the general assembly provided that an ordinance to rescind CEDIT in a county must be approved by April 1 of the year instead of June 1 as previously required.⁸³ Eighth, the general assembly made a technical change in CEDIT in cross referencing back to the adjusted gross income tax definitions.⁸⁴

In the area of inheritance and estate tax, the general assembly enacted into law one bill which contains three key provisions.⁸⁵ The first of these provides that the first \$100,000 transferred to a Class A transferee is exempt from the inheritance tax.⁸⁶ Second, the general assembly required the IDSR to prescribe an affidavit that may be used to state that no inheritance tax is due after applying the exemptions under this article.⁸⁷ Third, the general assembly provided that each year a portion of remitted Indiana estate tax shall be distributed to each

75. *Id.* § 6-1.1-5-5.5 (effective July 1, 1997).

76. H.R. 1542, 110th Leg., 1st Reg. Sess. §§ 13, 40 (Ind. 1997); H.R. 1777, 110th Leg., 1st Reg. Sess. §§ 4-6 (Ind. 1997); H.R. 1784, 110th Leg., 1st Reg. Sess. §§ 17-19 (Ind. 1997).

77. IND. CODE § 6-3.5-1.1-3.1(f) (effective May 13, 1997).

78. H.R. 1542, 110th Leg., 1st Reg. Sess. § 4 (Ind. 1997) (effective May 13, 1997).

79. IND. CODE § 6-3.5-1.1-18 (retroactive to Jan. 1, 1997).

80. *Id.* § 6-3.5-6-5 (effective Jan. 1, 1998).

81. *Id.* § 6-3.5-6-12(b) (retroactive to Jan. 1, 1997).

82. *Id.* § 6-3.5-6-22 (retroactive to Jan. 1, 1997).

83. *Id.* § 6-3.5-7-7 (effective Jan. 1, 1998).

84. *Id.* § 6-3.5-7-18 (retroactive to Jan. 1, 1997).

85. S. 9, 110th Leg., 1st Reg. Sess. (Ind. 1997).

86. IND. CODE § 6-4.1-3-10 (Supp. 1997) (effective July 1, 1997, for decedents who die after June 30, 1997).

87. *Id.* § 6-4.1-3-12.5 (effective July 1, 1997).

county.⁸⁸ To determine the amount each county is to receive the IDSR is to determine the average inheritance tax retained by each county for each fiscal year for fiscal years beginning July 1, 1990 through June 30, 1997, excluding the lowest and highest year from the average calculation.⁸⁹ The average minus the amount retained by the county in the immediately preceding fiscal year shall be distributed to the county by August 15.⁹⁰

II. INFORMATION REGARDING INDIANA DEATH TAXES AND INDIANA PROBATE PROCESS

A. Indiana Inheritance Tax

There is no Indiana inheritance tax on the value of property received by a surviving spouse from the surviving spouse's deceased spouse,⁹¹ nor on property transferred by a decedent to a qualified charitable organization.⁹² All other transferees are taxed as follows:⁹³

88. *Id.* § 6-4.1-3-12.5(b) (effective July 1, 1997).

89. *Id.* § 6-4.1-11-6(c) (effective July 1, 1997).

90. *Id.* § 6-4.1-11-6.

91. *Id.* § 6-4.1-3-7.

92. *Id.* § 6-4.1-3-1.

93. *See id.* §§ 6-4.1-3-10 to -12, 6-4.1-5-1.

Class A Beneficiaries

Relationship To Decedent	Exempt Amount
Each lineal ancestor and descendant of the decedent transferor	100,000

Value			Tax		
From	To	Amount	+	Percent	Value Over
0	25,000	0	+	1	0
25,000	50,000	250	+	2	25,000
50,000	200,000	750	+	3	50,000
200,000	300,000	5,250	+	4	200,000
300,000	500,000	9,250	+	5	300,000
500,000	700,000	19,250	+	6	500,000
700,000	1,000,000	31,250	+	7	700,000
1,000,000	1,500,000	52,250	+	8	1,000,000
1,500,000	Unlimited	92,250	+	10	1,500,000

Class B Beneficiaries

Relationship To Decedent	Exempt Amount
Each brother and sister of decedent transferor	500
Each descendant of a brother or sister of decedent transferor	500
Each spouse, widow, or widower of decedent transferor's children	500

Value			Tax		
From	To	Amount	+	Percent	Value Over
0	100,000	0	+	7	0
100,000	500,000	7,000	+	10	100,000
500,000	1,000,000	47,000	+	12	500,000
1,000,000	Unlimited	107,000	+	15	1,000,000

Class C Beneficiaries

Relationship To Decedent	Exempt Amount
Each individual not referred to above	100

Value			Tax		
From	To	Amount	+	Percent	Value Over
0	100,000	0	+	10	0
100,000	1,000,000	10,000	+	15	100,000
1,000,000	unlimited	145,000	+	20	1,000,000

B. Indiana Estate Tax

If the inheritance tax computed above is less than the amount of the state death tax credit for federal estate tax, as computed under Internal Revenue Code section 2011, then the State of Indiana imposes an estate tax equal to the difference.⁹⁴

C. Indiana Generation Skipping Transfer Tax

The Indiana generation skipping transfer tax absorbs some or all of the federal credit for any generation skipping transfer tax which is paid to states.⁹⁵

D. Indiana Probate

The survivor's allowance is \$15,000.⁹⁶

The amount for qualifying as a small estate is \$25,000.⁹⁷

In the area of tax on financial institutions, the general assembly enacted into law one bill which contain two key provisions.⁹⁸ The first of these provisions clarifies the add back for financial institutions' tax for recovery of a bad debt that was previously deducted from income.⁹⁹ Second, the general assembly lowered the threshold amount of financial institution tax liability per quarter, which requires remittance via electronic funds transfer¹⁰⁰ from \$20,000 to \$10,000.¹⁰¹

In the area of motor fuel and vehicle excise tax, the general assembly enacted into law three bills which contain twenty-five key provisions.¹⁰² The first of these provides that if the average or the estimated monthly remittance for gasoline tax exceeds \$10,000, then the remittance¹⁰³ must be made by electronic funds transfer.¹⁰⁴ Second, the general assembly required that special fuel suppliers remit 100% of the tax remitted for the month preceding the previous calendar month, or 95% of the prior month's actual liability, by the fifteenth of the month.¹⁰⁵ Also, the provision requires any additional remittance by the

94. *Id.* § 6-4.1-11-2.

95. *See id.* § 6-4.1-11.5-8.

96. *Id.* § 29-1-4-1.

97. *Id.* § 29-1-8-1.

98. H.R. 1784, 110th Leg., 1st Reg. Sess. (Ind. 1997).

99. IND. CODE § 6-5.5-1-2 (Supp. 1997).

100. Personal or overnight courier delivery of payment by cashier's or certified check or money order are also acceptable.

101. IND. CODE § 6-5.5-6-3(c) (Supp. 1997) (effective Jan. 1, 1998).

102. H.R. 1784, 110th Leg., 1st Reg. Sess. §§ 22-23 (Ind. 1997); H.R. 1785, 110th Leg., 1st Reg. Sess. §§ 1-21 (Ind. 1997); H.R. 1811, 110th Leg., 1st Reg. Sess. § 1 (Ind. 1997); S. 4, 110th Leg., 1st Spec. Sess. § 1 (Ind. 1997).

103. Personal or overnight courier delivery of payment by cashier's or certified check or money order are also acceptable.

104. IND. CODE § 6-6-1.1-502(b) (Supp. 1997) (effective Jan. 1, 1998).

105. *Id.* § 6-6-2.5-35 (effective Jan. 1, 1998).

twentieth of the month when the monthly reports are due.¹⁰⁶ Third, the general assembly clarified the reporting requirements for special fuel suppliers and importers regarding the amount of special fuel tax due on a monthly basis.¹⁰⁷ Fourth, the general assembly added importers and blenders to the suppliers as entities that are subject to penalty provisions for failure to properly report and remit special fuel tax.¹⁰⁸ Fifth, the general assembly added the definitions of "establishing a base," "inventory aircraft," and "established place of business" to the aircraft excise tax and registration chapter.¹⁰⁹ Sixth, the general assembly clarified that a person is required to register an aircraft within thirty-one days after the purchase date, or within sixty days of establishing a base in Indiana.¹¹⁰ Seventh, the general assembly clarified that a nonresident who owns an aircraft and establishes a base in Indiana is required to register the aircraft in Indiana.¹¹¹ Eighth, the general assembly deleted the requirement that a duplicate certificate of registration for an aircraft have the word "duplicate" printed or stamped on the registration.¹¹² Ninth, the general assembly deleted the provision that voids a certificate of registration fifteen days after the sale or transfer of an aircraft.¹¹³ This change also provides that a person shall pay the sales or use tax on an aircraft at the time the aircraft is registered or within thirty-one days of the date of purchase, unless the purchaser provides proof to the IDSR that the tax has already been paid.¹¹⁴ Tenth, the general assembly clarified that a nonresident is not exempt from registration and excise tax once the nonresident establishes a base for the aircraft in Indiana and required a nonresident to file with the IDSR, within thirty-one days of purchase, proof that the aircraft is based and registered in another state.¹¹⁵ It also adds a university or college supported in part by state funds to the entities that are exempt from the aircraft excise tax.¹¹⁶ Eleventh, the general assembly deleted current dealer registration certificate requirements.¹¹⁷ Twelfth, the general assembly imposed new requirements for an aircraft dealer to be registered with the IDSR.¹¹⁸ The twenty-five dollar registration fee remains the same.¹¹⁹ Thirteenth, the general assembly established December 15 as the annual renewal date for an aircraft dealer registration certificate.¹²⁰ Also, the

106. *Id.*

107. *Id.* § 6-6-2.5-56.5 (effective Jan. 1, 1998).

108. *Id.* § 6-6-2.5-63 (effective Jan. 1, 1998).

109. *Id.* § 6-6-6.5-1 (effective Jan. 1, 1998).

110. *Id.* § 6-6-6.5-2 (effective Jan. 1, 1998).

111. *Id.* § 6-6-6.5-3 (effective Jan. 1, 1998).

112. *Id.* § 6-6-6.5-7 (effective Jan. 1, 1998).

113. *Id.* § 6-6-6.5-8 (effective Jan. 1, 1998).

114. *Id.*

115. *Id.* § 6-6-6.5-9 (effective Jan. 1, 1998).

116. *Id.*

117. *Id.* § 6-6-6.5-10 (effective Jan. 1, 1998).

118. *Id.* § 6-6-6.5-10.1 (effective Jan. 1, 1998).

119. *Id.*

120. *Id.* § 6-6-6.5-10.2 (effective Jan. 1, 1998).

IDSR may request additional information at the time of renewal if a dealer has changed its address or significantly altered its facilities.¹²¹ Finally, this change allows the IDSR to revoke a dealer's certificate for noncompliance with tax statutes, rules, and requirements of the IDSR.¹²² Fourteenth, the general assembly permitted the IDSR to revoke an aircraft dealer's license if it is determined that the dealer is not a bona fide aircraft dealer.¹²³ Also, the change provides that the dealer may appeal the revocation.¹²⁴ Fifteenth, the general assembly required that a seller notify the IDSR when an aircraft is sold within five days of the date of the sale.¹²⁵ Sixteenth, the general assembly provided notification procedures for the aircraft excise tax once the IDSR is notified of the transfer.¹²⁶ Seventeenth, the general assembly provided that a dealer may not use aircraft in inventory for anything else other than for demonstration flights unless the dealer charges the fair market value rental.¹²⁷ Eighteenth, the general assembly clarified the reporting requirements of a dealer for purposes of the aircraft excise tax, and establishes the last day of February as the due date.¹²⁸ Nineteenth, the general assembly established the priority of any partial payment that is received.¹²⁹ The payment is applied against the registration fee and then against any penalty or interest that is owed.¹³⁰ Twentieth, the general assembly deleted registration dates¹³¹ which had been replaced in section 17 of House Bill 1785.¹³² Twenty-first, the general assembly provided a penalty if the owner of the aircraft does not pay the sales tax when it is due.¹³³ Twenty-second, the general assembly required the IDSR to distribute an excise tax report that includes aircraft identification, owner information, and excise tax payment to each county treasurer, which must indicate the county where the aircraft is normally kept when not in operation.¹³⁴ Twenty-third, the general assembly deleted archaic language that phased in the tax rate per ton for hazardous waste disposal.¹³⁵ Twenty-fourth, the general assembly permitted Marion County to adopt a supplemental auto rental excise tax on the rental of passenger motor vehicles and trucks in the county for a period of less than thirty days.¹³⁶ The

121. *Id.*

122. *Id.*

123. *Id.* § 6-6-6.5-10.3 (effective Jan. 1, 1998).

124. *Id.*

125. *Id.* § 6-6-6.5-10.4 (effective Jan. 1, 1998).

126. *Id.* § 6-6-6.5-10.5 (effective Jan. 1, 1998).

127. *Id.* § 6-6-6.5-10.6 (effective Jan. 1, 1998).

128. *Id.* § 6-6-6.5-10.7 (effective Jan. 1, 1998).

129. *Id.* § 6-6-6.5-14 (effective Jan. 1, 1998).

130. *Id.*

131. *Id.* § 6-6-6.5-15 (effective Jan. 1, 1998).

132. H.R. 1785, 110th Leg., 1st Reg. Sess. § 19 (Ind. 1997) (effective Jan. 1, 1998).

133. IND. CODE § 6-6-6.5-19 (Supp. 1997) (effective Jan. 1, 1998).

134. *Id.* § 6-6-6.5-21 (effective Jan. 1, 1998).

135. *Id.* § 6-6-6.6-2 (effective Jan. 1, 1998).

136. *Id.* § 6-6-9.7 (effective June 4, 1997).

rental rate is 2% of the gross retail income received by the retail merchant for the rental.¹³⁷ Temporary leases of vehicles as the result of automobile insurance reimbursements are exempt from the tax.¹³⁸ Vehicles rented as part of a funeral service are exempt from the tax.¹³⁹ Revenue from the tax is paid to the capital improvement board of managers.¹⁴⁰ Twenty-fifth, the general assembly provided that the IDSR may not make a distribution to a county of the "emergency planning" and "right to know" fund until the IDSR receives notice from the emergency response commission that a county has complied with section 13-25-1-6(b) of the Indiana Code.¹⁴¹

In the area of tax administration, the general assembly enacted into law one bill which contain four key provisions.¹⁴² The first of these provides that a taxpayer can review a letter of findings before it is published in the Indiana Register to sanitize it for information that is considered a trade secret or otherwise confidential in the taxpayer's view.¹⁴³ Second, the general assembly allowed the commissioner to settle a tax dispute before it is filed in tax court if there is doubt as to the constitutionality of the tax, the right to impose the tax, the correct amount due, the collectibility of the tax, or a question of whether the person was a resident of Indiana.¹⁴⁴ Third, the general assembly extended the period in which the IDSR may issue a proposed assessment if a taxpayer's federal income tax liability is adjusted due to an assessment of a federal deficiency or the filing of an amended tax return.¹⁴⁵ The provision also provides that the period is extended to six months after the date the taxpayer files notice of the modification.¹⁴⁶ Fourth, the general assembly provided that an excess tax payment that is not credited against current or future tax liabilities within ninety days, accrues interest from the later of the day the tax payment was due or the day the tax was paid.¹⁴⁷

In the area of innkeeper taxes and other local taxes, the general assembly enacted five bills which contain thirty-one key provisions.¹⁴⁸ The first of these provided that sales tax exemptions flow through to the St. Joseph County Innkeeper's Tax.¹⁴⁹ Second, the general assembly provided that sales tax

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* § 6-6-10-7 (effective July 1, 1997).

142. H.R. 1784, 110th Leg., 1st Reg. Sess. §§ 24-27 (Ind. 1997).

143. IND. CODE § 6-8.1-3-3.5 (effective July 1, 1997).

144. *Id.* § 6-8.1-3-17 (effective Jan. 1, 1998).

145. *Id.* § 6-8.1-5-2 (effective Jan. 1, 1998).

146. *Id.*

147. *Id.* § 6-8.1-9-2 (effective Jan. 1, 1998).

148. H.R. 1501, 110th Leg., 1st Reg. Sess. § 1 (Ind. 1997); H.R. 1784, 110th Leg., 1st Reg. Sess. § 28 (Ind. 1997); S. 4, 110th Leg., 1st Spec. Sess. §§ 2-6 (Ind. 1997); S. 200, 110th Leg., 1st Reg. Sess. §§ 1-3 (Ind. 1997); S. 234, 110th Leg., 1st Reg. Sess. §§ 1-22 (Ind. 1997).

149. IND. CODE § 6-9-1-5 (effective July 1, 1997).

exemptions flow through to the Lake County Innkeeper's Tax.¹⁵⁰ Third, the general assembly provided that sales tax exemptions flow through to the Vanderburgh County Innkeeper's Tax.¹⁵¹ Fourth, the general assembly provided that sales tax exemptions flow through to the Floyd/Clark County Innkeeper's Tax.¹⁵² Fifth, the general assembly provided that sales tax exemptions flow through to the Monroe County Innkeeper's Tax.¹⁵³ Sixth, the general assembly provided that sales tax exemptions flow through to the Knox County Innkeeper's Tax.¹⁵⁴ Seventh, the general assembly provided that sales tax exemptions flow through to the LaPorte County Innkeeper's Tax.¹⁵⁵ Eighth, the general assembly provided that sales tax exemptions flow through to the Tippecanoe County Innkeeper's Tax.¹⁵⁶ Ninth, the general assembly provided that sales tax exemptions flow through to the Marion County Innkeeper's Tax.¹⁵⁷ Tenth, the general assembly allowed Marion County to increase the innkeeper's tax from 5% to 6% with the increase dedicated to the payment of obligations to expand the convention center.¹⁵⁸ Eleventh, the general assembly provided that sales tax exemptions flow through to the Allen County Innkeeper's Tax.¹⁵⁹ Twelfth, the general assembly provided that sales tax exemptions flow through to the Wayne County Innkeeper's Tax.¹⁶⁰ Thirteenth, the general assembly allowed White County to impose an innkeeper's tax at a rate up to 3% of gross retail income derived from lodging.¹⁶¹ Revenue from the tax is to be deposited in a lake enhancement fund for use in enhancing lakes located in the county, and for silt trap maintenance.¹⁶²

Fourteenth, the general assembly provided that sales tax exemptions flow through to the White County Innkeeper's Tax.¹⁶³ Fifteenth, the general assembly provided that sales tax exemptions flow through to the Vigo County Innkeeper's Tax.¹⁶⁴ Sixteenth, the general assembly provided that Marion County admissions tax does not apply to events sponsored by an educational institution or an association representing an educational institution, an event sponsored by a religious organization, or an event sponsored by a charitable organization.¹⁶⁵

150. *Id.* § 6-9-2-1 (effective July 1, 1997).
151. *Id.* § 6-9-2.5-6 (effective July 1, 1997).
152. *Id.* § 6-9-3-4 (effective July 1, 1997).
153. *Id.* § 6-9-4-6 (effective July 1, 1997).
154. *Id.* § 6-9-5-6 (effective July 1, 1997).
155. *Id.*
156. *Id.* § 6-9-7-6 (effective July 1, 1997).
157. *Id.* § 6-9-8-2 (effective July 1, 1997).
158. *Id.* § 6-9-8-3 (effective June 4, 1997).
159. *Id.* § 6-9-9-2 (effective July 1, 1997).
160. *Id.* § 6-9-10-6 (effective July 1, 1997).
161. *Id.* § 6-9-10.5 (effective May 12, 1997).
162. *Id.*
163. *Id.* § 6-9-10.5-6 (effective May 13, 1997).
164. *Id.* § 6-9-11-6 (effective July 1, 1997).
165. *Id.* § 6-9-13-1 (effective June 4, 1997).

Seventeenth, the general assembly expanded the admissions tax to include any event and not just a professional sporting event held in a facility operated by the Capital Improvements Board of Marion County.¹⁶⁶ Eighteenth, the general assembly provided that sales tax exemptions flow through to the Brown County Innkeeper's Tax.¹⁶⁷ Nineteenth, the general assembly provided that sales tax exemptions flow through to the Jefferson County Innkeeper's Tax.¹⁶⁸ Twentieth, the general assembly increased the size of the Howard County convention and tourism commission from five to seven members.¹⁶⁹

Twenty-first, the general assembly permitted Howard County to use its innkeeper's tax funds for the acquisition, construction, improvement, maintenance, financing, or refinancing of land, facilities, or equipment for conventions, trade shows, visitors, or special events.¹⁷⁰ Twenty-second, the general assembly permitted Howard County to increase its Innkeeper's Tax from 4% to 5% until June 30, 2007, whereupon it reverts back to 4%.¹⁷¹ Twenty-third, the general assembly provided that sales tax exemptions flow through to the Howard County Innkeeper's Tax.¹⁷² Twenty-fourth, the general assembly provided that sales tax exemptions flow through to the Madison County Innkeeper's Tax.¹⁷³ Twenty-fifth, the general assembly provided that sales tax exemptions flow through to the Uniform County Innkeeper's Tax.¹⁷⁴ Twenty-sixth, the general assembly expanded the usage of the Uniform County Innkeeper's Tax to include expenses for tourism which will include expenditures for advertising, promotional activities, trade shows, special events, and recreation.¹⁷⁵ Twenty-seventh, the general assembly made it a requirement that the county executive create a commission to promote conventions, visitors, and tourism in a county.¹⁷⁶ Twenty-eighth, the general assembly further clarified that the Uniform Innkeeper's Tax funds can be used to promote tourism in the county.¹⁷⁷ Twenty-ninth, the general assembly provided that sales tax exemptions flow through to the Elkhart County Innkeeper's Tax.¹⁷⁸ Thirtieth, the general assembly established the Hendricks County Admission Tax Fund for deposit of the Admissions Tax.¹⁷⁹ The revenue will be used to fund private

166. *Id.* § 6-9-13-1, -2 (effective June 4, 1997).

167. *Id.* § 6-9-14-6 (effective July 1, 1997).

168. *Id.* § 6-9-15-6 (effective July 1, 1997).

169. *Id.* § 6-9-16-2 (effective July 1, 1997).

170. *Id.* § 6-9-16-3 (effective May 6, 1997).

171. *Id.* § 6-9-16-6 (effective July 1, 1997).

172. *Id.*

173. *Id.* § 6-19-17-3 (effective July 1, 1997).

174. *Id.* § 6-9-18-3 (effective July 1, 1997).

175. *Id.* § 6-9-18-4 (effective July 1, 1997).

176. *Id.* § 6-9-18-5 (effective July 1, 1997).

177. *Id.* § 6-9-18-6 (effective July 1, 1997).

178. *Id.* § 6-9-19-3 (effective July 1, 1997).

179. *Id.* § 6-9-28-7 (effective July 1, 1997).

enterprise economic development projects.¹⁸⁰ Thirty-first, the general assembly allowed Marion County to impose a Capital Improvement Board Revenue Replacement Supplemental Tax to replace revenue that is lost from the withdrawal of a contract providing an entity the right to name a facility owned by the Capital Improvement Board that displaces workers.¹⁸¹ The Supplemental Tax may be imposed on the Innkeepers Tax, the Admissions Tax, or the Supplemental Auto Rental Excise Tax.¹⁸² The change also permits the Marion County treasurer to collect the tax at the maximum tax rate of 1%.¹⁸³

In the area of motor carriers and vehicle registration, the general assembly enacted into law two bills which contain six key provisions.¹⁸⁴ The first of these provides that intrastate motor carriers not operating under authority issued by the U.S. Department of Transportation are required to register with the IDSR, and display a certification number issued by the IDSR.¹⁸⁵ Second, the general assembly allowed the IDSR to stagger the issuing of registration permits for vehicles subject to the International Registration Plan.¹⁸⁶ Third, the general assembly specified that the IDSR may issue temporary trip permits for tractor-trailers.¹⁸⁷ Fourth, the general assembly permitted the IDSR to issue hunter's permits to a common carrier that contracts with an owner/operator of a tractor-trailer so that when the owner/operator ceases working for the common carrier, if the registration was in the name of the common carrier, the owner may have a hunter's permit transferred to the owner, and the owner may move the tractor-trailer within Indiana for thirty days to look for employment without first registering the tractor-trailer.¹⁸⁸ Fifth, in a noncode provision, the general assembly allowed the IDSR to issue a temporary registration for a tractor-trailer when all communication with a person seeking the temporary registration has been done by telephone and fax machine.¹⁸⁹ Sixth, the general assembly provided that a vehicle longer than eighty-five feet or wider than ten feet six inches may not be operated at a speed greater than forty-five miles per hour.¹⁹⁰ Current length and width requirements are eighty feet and eight feet six inches, respectfully.¹⁹¹

In the area of other relevant laws, the general assembly enacted into law five

180. *Id.*

181. *Id.* § 6-9-31-2 (effective July 1, 1997).

182. *Id.*

183. *Id.*

184. H.R. 1846, 110th Leg., 1st Reg. Sess. §§ 1-2 (Ind. 1997); H.R. 1929, 110th Leg., 1st Reg. Sess. §§ 3, 6, 8, 15 (Ind. 1997).

185. IND. CODE § 8-2.1-24-18 (effective July 1, 1997).

186. *Id.* § 9-18-2-7 (effective July 1, 1997).

187. *Id.* § 9-11-7-2 (effective July 1, 1997).

188. *Id.* § 9-18-7-6 (effective Jan. 1, 1998).

189. H.R. 1929, 110th Leg., 1st Reg. Sess. § 15 (Ind. 1997) (effective July 1, 1997).

190. IND. CODE § 9-21-5-5 (Supp. 1997) (effective July 1, 1997).

191. *Id.*

bills which contain seven key provisions.¹⁹² The first of these provides that if a voter registration form is returned to the IDSR, the IDSR is required to forward the affidavit to the county voter registration office of the county of the taxpayer that sent the affidavit to the IDSR.¹⁹³ Second, the general assembly required the Child Support Bureau to enter into an agreement with the IDSR to operate a data match system with each financial institution doing business in the state.¹⁹⁴ The provision also requires each financial institution doing business in the state to provide the IDSR with information on noncustodial parents that have an account with the financial institution and are delinquent.¹⁹⁵ The provision also permits the financial institution to submit the information to the IDSR and for the IDSR to furnish the list of noncustodial parents to the financial institution.¹⁹⁶ When the IDSR determines there is a match, the IDSR is required to notify the individual, the financial institution, and the bureau of the intent to encumber against the account and that the individual has twenty days to protest the child custody lien.¹⁹⁷ A lien issued under this provision will be in effect for 120 days.¹⁹⁸ The matches are required to be performed on a quarterly basis.¹⁹⁹ The bureau shall reimburse the IDSR for the actual costs incurred.²⁰⁰ Third, the general assembly provided that the commissioner or his or her designee is a member of the Underground Storage Tank Financial Assurance Board.²⁰¹ Fourth, the general assembly increased the gasoline inspection fee from four cents to forty cents per fifty gallons.²⁰² Fifth, the general assembly created a Professional Sports Development Area (PSDA) in Marion County. This permits the Metropolitan Development Commission to establish a PSDA and, as part of it, a facility where any professional sports team engages in training or where a professional sporting event is held.²⁰³ The provision requires the commission to submit the resolution to the Budget Committee for approval.²⁰⁴ Upon approval of the Budget Committee, sales and use taxes, individual income taxes, county option income taxes, and food and beverage taxes generated from within the area will be allocated to the area.²⁰⁵ In addition, all salary, wages and bonuses paid to a

192. S. 3, 110th Leg., 1st Spec. Sess. §§ 19-20 (Ind. 1997); S. 13, 110th Leg., 1st Spec. Sess. § 22 (Ind. 1997); S. 359, 110th Leg., 1st Reg. Sess. § 4 (Ind. 1997); H.R. 1633, 110th Leg., 1st Reg. Sess. § 11 (Ind. 1997); H.R. 1844, 110th Leg., 1st Reg. Sess. § 71 (Ind. 1997).

193. IND. CODE § 3-7-23-3 (effective May 13, 1997).

194. *Id.* § 12-17-2-33.1 (effective July 1, 1997).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* § 13-23-11-2 (effective May 13, 1997).

202. *Id.*

203. *Id.* § 36-7-31 (effective June 4, 1997).

204. *Id.*

205. *Id.*

professional athlete for services taxable in Indiana and earned in the tax area shall be allocated to Indiana if the athlete is a member of a team that plays the majority of its events in the area.²⁰⁶ The total amount of state revenue captured by the tax area may not exceed \$5 million per year.²⁰⁷ The commission is required to notify the IDSR annually who the employers are in the tax area, and the street names and range of street numbers in the tax area.²⁰⁸ The IDSR is required to distribute all the money in the fund to the Capital Improvement Board monthly.²⁰⁹ Sixth, the general assembly permitted any city or county to create a PSDA similar to the one described above.²¹⁰ This provision caps the amount of revenue that can be designated annually to five dollars per resident of the city or county.²¹¹ Seventh, in a noncode provision, the general assembly provided that the historic preservation tax credit applies to pass through entities for any claims filed after December 31, 1993.²¹²

Finally, the general assembly, in a noncode provision, enacted into law one bill which contains one key provision which repealed eleven code sections and two noncode sections.²¹³ The code sections which were repealed are as follows: section 4-32-13-5 of the Indiana Code, concerning the commissioner hiring an independent firm to do a security study of the IDSR in regard to charity gaming; section 6-2.1-3-17, concerning joint venture and pool income being subject to the gross income tax; section 6-2.1-7-6, concerning interrogatories required by a township assessor; section 6-2.1-8-3, concerning changes in interpretation of law already contained in section 6-8.1, which applies to all listed taxes; section 6-2.1-8-8, concerning interrogatories required by a township assessor; sections 6-2.1-8-9 and 6-2.1-8-10, both concerning cites to laws and rules adopted prior to the recodification; sections 6-2.5-10-3 and 6-2.5-10-4, concerning cites to laws prior to the recodification; section 6-3-5-2, which set the dates for reciprocity with other states for the individual adjusted gross income tax at June 30, 1962; section 6-3-8-3, which set the effective date for the supplemental net income tax at January 1, 1972; section 6-3.1-3, which provided for the credit for donations of high technology equipment to schools (this credit only applied to donations made before January 1, 1986); and section 6-3.5-3, which provided for the occupation income tax later declared unconstitutional by the supreme court.

The two noncode provisions which were repealed are section 6-2.1-5-1 of the Indiana Code, concerning quarterly estimated gross income tax payment dates, and section 6-3-4-4, concerning quarterly estimated adjusted gross income tax payment dates.²¹⁴

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* § 36-7-31.3-1 (effective June 4, 1997).

211. *Id.*

212. H.R. 1633, 110th Leg., 1st Reg. Sess. § 11 (Ind. 1997) (effective May 13, 1997).

213. H.R. 1784, 110th Leg., 1st Reg. Sess. § 31 (Ind. 1997) (effective May 13, 1997).

214. S. 6, 110th Leg., 1st Spec. Sess. § 95 (Ind. 1997) (effective July 1, 1997).

II. INDIANA TAX COURT OPINIONS AND DECISIONS

A. Indiana Income Taxes—Indiana Gross Income Tax (IGIT)

1. *Cooper Industries, Inc. v. Indiana Department of State Revenue.*²¹⁵—In this case, the petitioners were a group of corporations operating as a unitary business. During 1988, the common parent of the group filed the parent's federal income tax return on a consolidated basis. For purposes of Indiana income taxes, however, the parent and those member corporations with ties to Indiana used the combined reporting method. Also, during 1988, the parent sold two subsidiaries and, as required by federal regulations, included the "excess loss account" income associated with those entities in the parent's federal consolidated taxable income.²¹⁶ Inasmuch as the Indiana adjusted gross income tax computation begins with the taxpayer's federal taxable income, the IDSR decided that Cooper Industries ("Cooper") was required to include the excess loss account income in its Indiana adjusted gross income, and Cooper challenged that determination in the Indiana Tax Court. The court held that "excess loss account income from a consolidated federal return does not constitute income for the purposes of a combined Indiana return."²¹⁷

Beginning in 1985 and continuing through 1988, Cooper filed its Indiana income tax returns on a combined basis, joined by the Affiliates, the Rig Companies, and approximately thirty other related companies. The combined reporting method was an alternative to Indiana's standard three-factor apportionment scheme. By this method, a group of corporations operating as a unitary business could aggregate their earnings before apportionment.²¹⁸ The Indiana Code stated that "[i]f the allocation and apportionment provisions of [article 3] do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the [IDSR] may require . . . the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income,"²¹⁹ including the "combined" filing method.²²⁰ The Code merely defined a "combined income tax return" as "any income tax return on which one (1) or more taxpayers report income, deductions, and credits on a combined basis with one (1) or more entities."²²¹ At the time when Cooper was filing on a combined basis in Indiana, Cooper was filing on a consolidated basis for federal tax purposes. Indiana also

215. 673 N.E.2d 1209 (Ind. T.C. 1996).

216. *Id.* at 1210-11.

217. *Id.* at 1209-10 (The citations to the federal regulations are to the federal regulations that were in existence during 1988.).

218. *Id.* at 1210.

219. IND. CODE § 6-3-2-2(l)(4) (Supp. 1997).

220. *Id.* § 6-3-2-2(p), (q).

221. *Id.* § 6-3-1-28 (1993).

permitted qualified taxpayers to file consolidated returns.²²²

The IDSР conceded, however, that Cooper did not make an election to file a consolidated return in Indiana under section 6-3-4-14 of the Indiana Code for any of the taxable years 1982 through 1988. The Internal Revenue Code permitted affiliated domestic corporations satisfying certain rules of common ownership to calculate income and tax liability as a single entity.²²³ For example, a parent corporation and its subsidiary constituted an affiliated group where the parent owned at least 80% of the total voting power and at least 80% of the total value of the stock of the subsidiary.²²⁴ Using this method, Cooper was able to deduct the net operating losses generated by the Rig Companies from Cooper's federal taxable income during the years at issue.²²⁵

In order to accurately reflect this tax benefit, however, Cooper was required simultaneously to reduce the bases in the subsidiaries in the amount of losses which were claimed as deductions by Cooper.²²⁶ Eventually, the bases were reduced to zero and Cooper was then required to record the losses in what are termed "excess loss accounts."²²⁷ Pursuant to Treasury Regulation § 1.1502-19(a)(1), when Cooper sold the Rig Companies in 1988, the amounts in the associated excess loss accounts were included in Cooper's federal taxable income for that year. The treatment accorded net operating losses was designed to prevent the taxpayer from reaping unjustified tax benefits.

As stated above, the sole issue presented was whether Cooper's excess loss accounts constituted adjusted gross income to Cooper for the purpose of Cooper's 1988 Indiana adjusted gross income taxes.²²⁸ The petitioners challenged their liability under both the Indiana adjusted gross income tax²²⁹ and the Indiana supplemental net income tax.²³⁰ However, because the tax base for the Indiana supplemental net income tax was defined in terms of Indiana adjusted gross income,²³¹ the court determined that an analysis of the provisions of the Indiana adjusted gross income tax was determinative in this case.²³² The court stated that the Indiana Code provided that "the term 'adjusted gross income' shall mean . . . [i]n the case of corporations, the same as 'taxable income' as defined in Section 63 of the Internal Revenue Code," subject to four adjustments which

222. *Id.* § 6-3-4-14(a); IND. ADMIN. CODE tit. 45, rr. 3.1-1-110 to -112 (1988).

223. I.R.C. § 1501 (1994).

224. *Id.* § 1504(a).

225. *Cooper Indus.*, 673 N.E.2d at 1210; *see also* Treas. Reg. §§ 1.1502-2, -21 (1994). The regulations governing consolidated returns were amended effective January 1, 1995. T.D. 8560, 59 Fed. Reg. 41666 (1994).

226. Treas. Reg. § 1.1502-32 (1994).

227. *Id.* § 1.1502-32(e).

228. *Cooper Indus.*, 673 N.E.2d at 1211-12.

229. IND. CODE §§ 6-3-1 to 6-3-7 (1993 & Supp. 1997).

230. *Id.* §§ 6-3-8-1 to -6 (1993).

231. *Id.* § 6-3-8-2(b).

232. *Cooper Indus.*, 673 N.E.2d at 1212-16.

were not applicable in this case.²³³ Therefore, the court stated this definition to be plain and unambiguous in that Indiana adjusted gross income begins with federal taxable income as defined by section 63 of the Internal Revenue Code, not as reported by the taxpayer.²³⁴

Thus, the court stated that “the issue is not what number appears on line 28 of a taxpayer’s federal income tax form 1120 but whether a particular item of income was included in taxable income pursuant to I.R.C. § 63.”²³⁵ Section 63(a) defines “taxable income” as “gross income minus the deductions allowed by this chapter (other than the standard deduction),”²³⁶ and under section 61, “gross income” includes “income derived from business” and “[g]ains derived from dealings in property.”²³⁷ The court stated that the provisions relating to excess loss accounts do not appear in the same chapter of the Internal Revenue Code as taxable income under section 63. The court also observed that the regulations governing consolidated returns provided that excess loss account income is not includable in income by virtue of section 63 and that section 1503(a) makes clear that the regulations under section 1502 govern the computation of the tax.²³⁸ Further, the court recognized that the subsection stated: “In any case in which a consolidated return is made or is required to be made, the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under section 1502 prescribed before the last day prescribed by law for filing of such return.”²³⁹

In order to determine a taxpayer’s “consolidated taxable income” under the regulations, each member of the consolidated group must first calculate its “separate taxable income.”²⁴⁰ This figure for each member “is computed in accordance with the provisions of the Code covering the determinations of taxable income of separate corporations,” subject to sixteen adjustments.²⁴¹ Among these adjustments is the addition of any income from excess loss accounts.²⁴² Thus, the court concluded that the excess loss account income is not includable in federal taxable income pursuant to section 63 of the Internal Revenue Code but rather “becomes income only as an adjustment to ‘separate taxable income’ under Treas. Reg. § 1.1502-12(f).”²⁴³ Thus, the excess loss account income is not includable in “taxable income.” The court further determined that “such amounts are not included in adjusted gross income under

233. *Id.* at 1212.

234. *Id.* at 1213.

235. *Id.*

236. I.R.C. § 63 (1994).

237. *Id.* § 61.

238. *Cooper Indus.*, 673 N.E.2d at 1214.

239. *Id.* at 1214 n.13.

240. Treas. Reg. § 1.1502-11(a) (1994).

241. *Id.* § 1.1502-12.

242. *Id.* § 1.1502-12(f).

243. *Cooper Indus.*, 673 N.E.2d at 1215.

Ind. Code Ann. § 6-3-1-3.5(b),²⁴⁴ nor in net income for the purposes of section 6-3-8-2(b) of the Indiana Code.

2. *Sherwin-Williams Co. v. Indiana Department of State Revenue*.²⁴⁵—In this case, the IDSR denied Sherwin-Williams Company's claim for refund of supplemental corporate net income taxes and adjusted gross income taxes for the years 1985 and 1986.²⁴⁶ Indiana imposed an income tax on every corporation's adjusted gross income derived from sources within Indiana.²⁴⁷ In cases in which a corporation derives business income from sources both within and outside Indiana, the "adjusted gross income derived from sources within the state of Indiana" was determined by an apportionment formula.²⁴⁸ Indiana adopted a standard form apportionment method which multiplied the business income derived from sources both within and outside Indiana by a fraction, the numerator of which was the property factor plus the payroll factor plus the sales factor, and the denominator of which was three.²⁴⁹

Sherwin-Williams was an Ohio Corporation qualified to conduct business in Indiana. Its principal business consisted of manufacturing and selling paint and related products. However, as part of its normal business activities, Sherwin-Williams regularly invested its working capital in a variety of securities. The management activities related to these investments were conducted in Ohio at Sherwin-Williams' worldwide headquarters. Sherwin-Williams treated the interest income generated as a result of the investment activities as non-business income and allocated the interest income to Ohio. On October 30, 1989, the IDSR assessed Sherwin-Williams with additional tax and interest for the tax years 1985 and 1986 based on its determination that the interest income constituted business income subject to apportionment. Sherwin-Williams conceded that the interest income was generated as an integral part of its unitary business which should have been treated as business income. However, on December 20, 1989, Sherwin-Williams filed a protest claiming that the denominator of the sales factor should be increased to include the gross proceeds generated by its investment activity.²⁵⁰ The Indiana adjusted gross income tax issue in this case was whether the denominator of Sherwin-Williams' sales factor should include the principal or capital element of investments which Sherwin-Williams made outside of Indiana.²⁵¹ "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year."²⁵² "Sales" were defined as "all gross

244. *Id.*

245. 673 N.E.2d 849 (Ind. T.C. 1996).

246. *Id.* at 850.

247. *Id.* at 851; *see also* IND. CODE § 6-3-2-1(b) (1993).

248. *Id.* (citing IND. CODE § 6-3-2-2).

249. *Id.* (citing IND. CODE § 6-3-2-2(b)).

250. *Id.* at 850.

251. *Id.* at 851.

252. *Id.* (quoting IND. CODE § 6-3-2-2(e)).

receipts of the taxpayer not allocated under IC 6-3-2-2(g) through IC 6-3-2-2(k).²⁵³ Sections 6-3-2-2(g)-(k) dealt with rents and royalties, capital gains and losses, interest, dividends, and patent or copyright royalties. The regulations further defined “sales” as “any business income of a corporate taxpayer . . . regardless of its actual source.”²⁵⁴

Thus, the question arose as to how the term “gross receipts” should be defined for the purpose of the denominator of the sales factor.²⁵⁵ The IDSR considered only the interest earned on the investment securities to be gross receipts.²⁵⁶ Sherwin-Williams argued that gross receipts equals the amount received on the sale, which includes both the interest earned and the principal.²⁵⁷ The IDSR responded that inclusion of the principal amount in the denominator “distorts the apportionment formula by giving extra weight to out of state sales.”²⁵⁸ The IDSR contended that there is great potential for abuse because Sherwin-Williams could use the same principal many times as it re-invests in short-term securities, rolling over the principal of the previously sold investment. Weighing both arguments, the court held that “‘gross receipts’ for the purpose of the sales factor includes only the interest income, and not the rolled over capital or return of principal, realized from the sale of investment securities.”²⁵⁹

3. *Farm Credit Services of Mid-America v. Indiana Department of State Revenue.*²⁶⁰—In *Farm Credit Services*, the petitioner was a member of the Farm Credit System, a nationwide network of cooperative, borrower-owned banks and local lending associations providing affordable credit to farmers and ranchers.²⁶¹ The Farm Credit System was designed to “furnish farmers and ranchers with a stable source of credit while at the same time encouraging them to participate in the ‘management, control, and ownership’ of the system.”²⁶² Petitioner Mid-American was one of hundreds of local lending associations chartered by the Farm Credit Administration and operating in the Farm Credit System.²⁶³ The Farm Credit Administration formally chartered petitioner as an Agricultural Credit Association (“ACA”) in March 1989, stating that Mid-America “is an institution of the Farm Credit System and a federally chartered instrumentality.”²⁶⁴ Nevertheless, the IDSR imposed Indiana’s gross income tax on Mid-America for 1989, as well as the franchise tax for 1990 through 1992.²⁶⁵

253. *Id.* (quoting IND. CODE § 6-3-1-24).

254. *Id.* (quoting IND. ADMIN. CODE tit. 45, r. 3.1-1-34 (1984)).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 853.

260. 677 N.E.2d 645 (Ind. T.C. 1997).

261. *Id.*; *see also* 12 U.S.C.A. § 2001 (1994).

262. *Farm Credit Servs.*, 677 N.E.2d at 645.

263. *Id.*

264. *Id.* at 646.

265. *Id.* (citing IND. CODE ANN. §§ 6-2.1-2-2, 6-5.5-2-1 (West 1989)).

The issue presented in this case was whether Mid-America, as an ACA, was an instrumentality of the federal government.²⁶⁶ The court recognized that such a service constitutes an important governmental function which has been recognized since the 1940s and that an ACA is subject to federal supervision and regulation from its creation to its termination. Congress authorized the creation of ACAs through the merger of PCAs and FLBAs with the provisos that all such mergers are approved by the Farm Credit Administration, and that the Farm Credit Administration charters the newly formed entities. The court further recognized that the federal government played an intimate role in the activities of ACAs because the statute directs the Farm Credit Administration to formulate and issue regulations regarding “the manner in which the powers and obligations of the associations that form the merged association are consolidated and, to the extent necessary, reconciled in the merged association.”²⁶⁷ The types of loans ACAs were allowed to make, the types of borrowers who are allowed to receive loans, and the geographic territories ACAs were allowed to serve were regulated by the Farm Credit Administration. In addition, the Farm Credit Administration was empowered to modify or revoke an ACA’s charter once granted. In fact, an ACA could not even terminate its own existence without complying with various procedural requirements and receiving approval from the Farm Credit Administration Board.²⁶⁸ Thus, ACAs were subject to precisely the sort of cradle-to-grave regulation that typifies federal instrumentalities. The court found that the statutory scheme for the Farm Credit System did not evidence an intent on the part of Congress that ACAs be treated as private entities for the purpose of state taxation and that ACAs have the attributes of federal instrumentalities in that they performed an important governmental function and are subject to extensive regulatory supervision by the federal government.²⁶⁹ Therefore, the court held that Farm Credit, as an ACA, was a federal instrumentality and was immune from the Indiana taxes at issue in this case.²⁷⁰

4. *Jefferson Smurfit Corp. v. Indiana Department of State Revenue*.²⁷¹—In *Jefferson Smurfit*, Smurfit provided a custom packaging service for manufacturers and other customers. In some cases, Smurfit provided the packaging materials at a cost to itself, and in other cases, the materials were provided by the customers. The product to be packaged was provided by the manufacturer or customer, whether or not the packaging material was to be supplied by Smurfit. The majority of Smurfit’s receipts were derived from the packaging of various products which are included with other products sold by the manufacturers (e.g., the toy prize in a box of cereal). Smurfit also packaged goods to be sold by Smurfit’s customers directly (e.g., packages of trading cards and chewing gum). Smurfit’s other sales consisted of the packaging of products

266. *Id.* at 647.

267. *Id.* at 650 (quoting 12 U.S.C. § 2279c-1(a)(2) (1994); 12 C.F.R. § 611.1122 (1996)).

268. *Id.*

269. *Id.*

270. *Id.* at 651.

271. 681 N.E.2d 806 (Ind. T.C. 1997).

which were either to be distributed by manufacturers in sales promotions or resold as "trial size" products (e.g., small samples of shampoo or detergent).²⁷²

The IDSR treated the first two types of sales as industrial processing, allowing such sales to be subject to lower "wholesale sales" rate of income tax. The third type was to be subjected to a higher rate of tax, but only in those instances when the IDSR found that there was no subsequent sale of the products by Smurfit's customers.²⁷³ Crucial to the court's holding in this case was the language used in section 6-2.1-2-1(c)(1)(D) of the Indiana Code which was amended and its form changed in 1985. The nature of these changes were such that the court determined that it was necessary to treat the taxes for 1984 (before the amendments) separately from 1985 and 1986.²⁷⁴ However, the dispute of taxable year of 1984 is not addressed in this Article.

The issue presented for 1985 and 1986 was whether section 6-2.1-2-1(c)(1)(D) of the Indiana Code, which defined receipts from industrial processing and servicing as wholesale sales, contained a resale requirement.²⁷⁵ This court held that it did not and that such an expansive interpretation would require a rewriting of the statute.²⁷⁶ The court reasoned that the reference to resale applied only to a specific type of industrial processing—enameling and plating—an activity that had been isolated into its own subpart.²⁷⁷ The IDSR argued that the resale requirement should be construed to apply not only to that paragraph, but to (D) generally, stressing that paragraph (ii) uses the same "servicing or processing" language that is contained in section (D).²⁷⁸ However, the court stated that section 6-2.1-2-1(c)(1)(D) of the Indiana Code is unambiguous after the 1985 amendments and that Smurfit had no resale requirement for 1985 and 1986.²⁷⁹ Smurfit, therefore, was entitled to a refund for the amount of tax erroneously paid for 1985 and 1986.²⁸⁰

5. *Thomas v. Indiana Department of State Revenue.*²⁸¹—Thomas filed an individual Indiana resident income tax return for 1992, listing Thomas' address as 5509 Washington Avenue in Evansville, Indiana.²⁸² The substantive issue in this case involved the simple issue of the relationship between the Indiana adjusted gross income tax law and the income tax law of Washington, D.C., specifically, whether a payment of income taxes to Washington, D.C. could be credited against an Indiana resident's adjusted gross income tax return.²⁸³ With

272. *Id.* at 807.

273. *Id.*

274. *Id.*

275. *Id.* at 810.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 811.

280. *Id.*

281. 675 N.E.2d 362 (Ind. T.C. 1997).

282. *Id.* at 365.

283. *Id.* at 364-65.

respect to the substantive tax law issue, the court agreed with the department which reasoned “that no credit was due because Washington, D.C. is a reverse credit jurisdiction, meaning that Indiana residents pay Indiana tax on income earned in the District of Columbia but receive a credit in the District for Indiana tax paid.”²⁸⁴ The court further determined that even if Thomas were claiming a credit (against the Indiana adjusted gross income tax) for a payment of a federal income tax, Indiana does not provide a credit for federal taxes paid against Indiana taxes owed.²⁸⁵

Thomas appealed the IDSR’s assessment and moved for summary judgment with respect to the substantive law and with respect to several procedural issues. First, because the IDSR misplaced Thomas’ Indiana adjusted gross income tax return and had to reconstruct Thomas’ Indiana adjusted gross income, Thomas argued that the IDSR had to produce the original return.²⁸⁶ In answer to this, the court held that a “court may permit the use of secondary evidence to prove the contents of a writing when the original is lost or has been destroyed, unless the proponent lost or destroyed the document in bad faith.”²⁸⁷ The court further observed that because there was no dispute as to the accuracy of the secondary evidence and no indication that the document was lost purposely, the evidence should be admitted.²⁸⁸

Second, Thomas stated that the IDSR violated his due process and statutory rights when the IDSR issued a warrant without responding to his written protests and without holding a hearing.²⁸⁹ With respect to this, the court stated that the statutory scheme clearly contemplated that the IDSR address any taxpayer protest before issuing a tax warrant or attempting to secure a judgment lien against a taxpayer.²⁹⁰ The court noted that the demand for payment must be made through the tax warrant and judgment lien mechanisms outlined in section 6-8.1-8-2 of the Indiana Code.²⁹¹ However, the court determined that the IDSR’s failure to follow the statutory procedures was a harmless error, because before the IDSR attempted to levy on Thomas’s property, the IDSR granted Thomas’ request for a hearing on the assessment and Thomas did not allege a deprivation of Thomas’ rights as a result of the delay.²⁹²

Third, Thomas alleged that the tax warrant was invalid because the warrant was computer generated and unsigned, and that Article 1, Section 11 of the Indiana Constitution required such “warrants” to be supported by oath and affirmation and be signed.²⁹³ However, the court observed that an IDSR tax

284. *Id.* at 365.

285. *Id.* at 366 (citing IND. CODE ANN. § 6-3-3 (West 1989)).

286. *Id.* at 365.

287. *Id.* (citing IND. EVID. R. 1004).

288. *Id.* at 366 (citing Lopez v. State, 527 N.E.2d 1119, 1125 (Ind. 1988)).

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 367.

293. *Id.*

warrant is not the sort of “warrant” referred to in the Constitution, because an IDSR tax warrant does not authorize state officers to enter upon a taxpayer’s land or to seize a person’s property; instead, a tax warrant merely triggers the process for establishing a judgment lien against a taxpayer’s property. However, a tax lien might involve an intrusion of the sort contemplated by the framers and ratifiers of Article 1, Section 11.²⁹⁴

Fourth, Thomas alleged that the State of Indiana did not have the authority to levy the Indiana adjusted gross income tax on sources of income earned outside Indiana.²⁹⁵ However, the court observed that a state “may tax all the income of its residents, even income earned outside the taxing jurisdiction.”²⁹⁶ The court also observed that if a state chooses to grant a credit to residents for taxes paid in other jurisdictions, it should not be mistaken for a lack of authority to levy on such proceeds.²⁹⁷ Therefore, the court held that “Indiana has the authority to tax the out-of-state income of its residents” under the Indiana adjusted gross income tax.²⁹⁸

Fifth, Thomas challenged the definition of the term “income” under the Indiana tax laws, which definition is the one used under the federal tax laws on which the Indiana adjusted gross income was based, by stating the federal income tax law was not broad enough to encompass the income involved in this case.²⁹⁹ However, the court determined that such income was clearly taxable under the federal income tax law and noted the Indiana General Assembly intended to adopt a broad definition of the term “income” when the Indiana General Assembly enacted the adjusted gross income tax law which clearly and unambiguously included annuity payments in the definition of adjusted gross income.³⁰⁰

Sixth, Thomas claimed that he was exempt from Indiana adjusted gross income tax because Thomas was not a resident of this state as the term “state” was defined in the Indiana Code.³⁰¹ The Indiana Code defined a “state” as “any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.”³⁰² However, the court observed that in *Richey v. Indiana Department of State Revenue*,³⁰³ this court addressed a “substantially similar claim and held that the phrase ‘United States’ does refer to the fifty states

294. *Id.*

295. *Id.*

296. *Id.* (quoting *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450 (1995)).

297. *Id.* at 368; *see also* 2 J. HELLERSTEIN & W. HELLERSTEIN, STATE TAXATION § 20.04 (Supp. 1993)).

298. *Thomas*, 675 N.E.2d at 368.

299. *Id.*

300. *Id.* at 368-69.

301. *Id.* at 369.

302. *Id.* (citing IND. CODE § 6-3-1-25 (West 1989)).

303. 634 N.E.2d 1375 (Ind. T.C. 1994).

of the union.”³⁰⁴ Next, the court determined that Thomas was an Indiana resident for the purpose of the Indiana adjusted gross income tax.³⁰⁵

Finally, Thomas alleged that Indiana’s income taxing scheme should be declared “void for vagueness” because the law fails to properly define the terms “income” and “state.”³⁰⁶ However, the court determined that the adjusted gross income tax statute, regulations, and IDSR bulletins “more than adequately define the proceeds subject to taxation.”³⁰⁷ Therefore, the court found that there was no issue of material fact and determined that the IDSR was entitled to judgment as a matter of law.³⁰⁸

B. Indiana Procedures for Tax Administration—Indiana State Board of Tax Commissioners

1. *Indiana Sugars, Inc. v. State Board of Tax Commissioners.*³⁰⁹—Indiana Sugars was a corporation primarily engaged in the manufacturing and converting of granulated sugar into powdered or liquid sugar. Sugars’ facilities are located in Lake County, Indiana within a statutorily designated “enterprise zone.”³¹⁰ Indiana allowed a property tax credit for “enterprise zone inventory,” which was essentially inventory located within an enterprise zone on the assessment date.³¹¹ The taxpayer had to file a Form EZ-1 with the county auditor for the county where the property was located and with the ISBTC. This had to be done between March 1 and May 15 in order to receive the tax credit on the next year’s property tax return.³¹² Filing could be extended until June 14. Sugars obtained an extension until the June 14 deadline. Sugars’ accountant testified that he delivered a completed EZ-1 form to Sugars on or about June 8, 1993. Sugars’ controller testified that due to a previous late filing of the EZ tax credit, the controller followed a lengthy series of procedures designed to prevent a similar occurrence. Among the steps the accountant took was to personally review the form, have the form signed by corporate officers, personally check the addresses and postage on the envelopes, and personally deposit the envelopes in the United States Mail, First Class. The controller testified before the ISBTC that the controller did each of these things on or before June 14, 1993—including personally mailing the EZ-1 form at the post office. However, the EZ-1 form was never received by the Lake County Auditor. Sugars’ credit was denied due to the failure to timely file an EZ-1 form.³¹³

304. *Thomas*, 675 N.E.2d at 359 (quoting *Richey*, 634 N.E.2d at 376-77).

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. 683 N.E.2d 1383 (Ind. T.C. 1997).

310. *Id.* at 1384.

311. *Id.* (citing IND. CODE ANN. § 6-1.1-20.8-1 (West 1989)).

312. *Id.* (citing IND. CODE ANN. § 6-1.1-20.8-2 (West 1989) (amended 1996)).

313. *Id.*

Upon learning that its EZ-1 credit for 1993 had been denied, Sugars filed for review by the Lake County Board of Review.³¹⁴ Sugars provided the County Board of Review with a copy of the EZ-1 form for 1993. On March 7, 1995, the Board of Review denied Sugars protest because the Board of Review had no record of an EZ-1 form being filed by Sugars prior to the filing deadline. On March 22, 1995, Sugars appealed to the ISBTC, but the credit was denied by the ISBTC on February 22, 1996, on the ground that Sugars had not timely filed an EZ-1 form. Sugars then filed Sugars' original appeal in the court, protesting the denial of the credit, and raising the issues of: whether an application for an EZ tax credit is considered filed if the application is placed in the U.S. Mail with First Class postage; and, what evidence is necessary to prove timely mailing.³¹⁵ In addressing these issues, the court stated that "final determinations by the [ISBTC] are only reversed by this Court when the decision is unsupported by substantial evidence, is arbitrary or capricious, constitutes an abuse of discretion, or exceeds statutory authority."³¹⁶ Further, the court stated that until such time as statutes are enacted or regulations are promulgated requiring more, mailing forms to the ISBTC via First Class U.S. Mail constitutes filing. The court stated that "the sworn testimony of a witness constitutes sufficient evidence to prove timely mailing . . . Sugars' controller testified under oath that he personally placed the application in the mail . . . this testimony constitutes direct testimony of one with personal knowledge and is reasonable evidence of mailing."³¹⁷ Therefore, the court found that Sugars application was filed in a timely manner and that mailing via First Class U.S. Mail is an acceptable method of filing. Further, the court held that Sugars presented sufficient evidence of a timely filing. Thus, the court determined that the ISBTC's decision was not supported by substantial evidence, was an abuse of the ISBTC's discretion and was arbitrary and capricious. Therefore, the court reversed the ISBTC's final determination and remanded the case to the ISBTC for further action consistent with the opinion.³¹⁸

2. *Boshart v. State Board of Tax Commissioners.*³¹⁹—In *Boshart*, the petitioners appealed a final determination of the ISBTC after the ISBTC refused to issue subpoenas pursuant to Indiana Trial Rule 28(F), for a hearing concerning a Goshen Community Schools construction project.³²⁰ The petitioners contended that due to this failure, Boshart could not adequately prepare for the hearing.³²¹ The petitioners remonstrated against the project following the procedures of section 6-1.1-20-3.2 of the Indiana Code. The petition process concluded, and, shortly thereafter, the Elkhart County Auditor announced that the project had

314. *Id.*

315. *Id.* at 1385.

316. *Id.*

317. *Id.* at 1387.

318. *Id.*

319. 672 N.E.2d 499 (Ind. T.C. 1996).

320. *Id.*

321. *Id.*

more signatures for it than against it, and as required by section 6-1.1-19-8 of the Indiana Code, the Goshen Community Schools petitioned the ISBTC for approval of the proposed lease rental agreement in connection with the construction project.³²² The ISBTC referred the petition to the Property Tax Control Board (Control Board) for the latter's recommendation per section 6-1.1-19-8(b) of the Indiana Code.³²³

Before the Control Board's hearing, certain petitioners expressed their concerns regarding the availability of documents relating to the lease. Goshen Community Schools refused to produce certain documents on the basis that the records were exempt from inspection under section 5-14-3-4 of the Indiana Code. The petitioners, pursuant to Indiana Trial Rule 28(F), asked the ISBTC to issue subpoenas duces tecum and schedule the depositions of several school officials and independent contractors.³²⁴ The ISBTC declined to issue the subpoenas. Therefore, the petitioners filed suit against the ISBTC in the county circuit court in order to stay the Control Board hearing pending discovery. The circuit court dismissed the suit after a hearing, and, the next day, the Control Board held its hearing. Counsel for the petitioners again argued that the petitioners had been denied documents by Goshen Community Schools. The Control Board recommended approval of the lease agreement, and ultimately, the ISBTC approved the lease rental agreement.³²⁵

The petitioners then filed an original tax appeal in this court and filed a motion for judgment on the pleadings under Indiana Trial Rule 12(C). The court stated that the petitioners' case should have ended under section 6-1.1-20-3.2(7) of the Indiana Code when the Elkhart County Auditor's office announced that the project had more signatures for the project than against the project.³²⁶ However,

322. *Id.* at 500 (citing IND. CODE ANN. § 6-1.1-19-8 (West Supp. 1996)).

323. *Id.* (citing IND. CODE ANN. § 6-1.1-19-8(b) (West Supp. 1996)).

324. *Id.* (citing IND. T.R. 28(F)). Trial Rule 28(F) states in pertinent part:

Discovery Proceedings Before Administrative Agencies. Whenever an adjudicatory hearing, including any hearing in any proceeding subject to judicial review, is held by or before an administrative agency, any party to that adjudicatory hearing shall be entitled to use the discovery provisions of Rules 26 through 37 of the Indiana Rules of Trial Procedure. Such discovery may include any relevant matter in the custody and control of the administrative agency.

T.R. 28 (F).

325. *Boshart*, 672 N.E.2d at 500.

326. *Id.* at 501. The statute provided, in part:

After a political subdivision has gone through the petition and remonstrance process set forth in this section, the political subdivision is not required to follow any other remonstrance or objection procedures under any other law relating to bonds or leases designed to protect owners of real property within the political subdivision from the imposition of property taxes to pay debt service or lease rentals. However, the political subdivision must still receive the approval of the [ISBTC] required by . . . IC 6-1.1-19-8.

IND. CODE § 6.1.1-20-3.2(7) (1993).

the court observed that the petitioners had their chance to stop the project but failed to convince a sufficient number of their neighbors of the wisdom of their position. Thus, the court could find no legal basis for the petitioners' assumption that they were parties to the process once the votes had been counted against them. Therefore, assuming that the hearing before the ISBTC, acting through the Control Board, was an "adjudicatory hearing," the petitioners are not parties to the adjudicatory hearing and were not entitled to invoke Indiana Trial Rule 28(F).³²⁷

3. *St. Joseph County v. State Board of Tax Commissioners*.³²⁸—This case commenced when several suits were filed by inmates and former inmates of the St. Joseph County Jail complaining of overcrowding, substandard conditions, and various violations of U.S. Constitutional rights, particularly those protected by the Fourteenth Amendment.³²⁹ These suits were consolidated into one class action litigation by the United States District Court for the Northern District of Indiana, South Bend Division.³³⁰ The judgment of the district court required the County to begin construction on a new jail with minimum capacity of 600 inmates on or before December 31, 1996.³³¹

The County sought ISBTC's approval for its planned construction, financing, and lease agreement. Several persons objecting to the jail project petitioned the ISBTC pursuant to section 36-1-10-14 of the Indiana Code. This petition resulted in a hearing conducted on November 26, 1996. The ISBTC found that the jail project was "necessary, wise, cost efficient, reasonable in size, and designed to allow for cost-effective expansion in the future, but conditioned its approval of the jail project on the County's obtaining consent for the project through the petition-remonstrance procedures"³³² of section 6-1.1-20-3.2 of the Indiana Code. Eventually, the County filed an original tax appeal with the court seeking reversal of the ISBTC's final determination. The County sought a lease agreement and bond financing from the St. Joseph County Jail Building Corporation. Therefore, petition-remonstrance proceedings would be necessary if the project were a "controlled project." A "controlled project" is any project, "financed by bonds or a lease, except for the following: . . . (5) A project that is required by a court order holding that federal law mandates the project."³³³ The sole issue presented to the court was whether the jail project fit within the exception provided in subsection (5) ("the Exception").³³⁴

The three basic elements that must be shown to fit within the exception are:

327. *Boshart*, 672 N.E.2d at 501.

328. 683 N.E.2d 1379 (Ind. T.C. 1997).

329. *Id.* at 1380.

330. *Id.*

331. *Id.*

332. *Id.* at 1381. Any "controlled project" using property taxes to pay a debt service or lease rental is required to go through a petition- remonstrance process. *See* IND. CODE § 6-1.1-20-3.2 (Supp. 1997).

333. IND. CODE § 6-1.1-20-1.1.

334. *St. Joseph County*, 683 N.E.2d at 1381.

“(1) a court order; (2) requires the project; and (3) holds that federal law mandates the project.”³³⁵ The court determined that the County satisfied each portion of this test, and determined that the construction of a new jail was not a “controlled project” and did not require petition-remonstrance proceedings.³³⁶

C. Indiana Property Taxes—Business Personal Property Tax (INVENTORY)

1. *Colwell/General, Inc. v. Indiana State Board of Tax Commissioners.*³³⁷—Colwell was a Minnesota corporation with operations in Indiana. Colwell manufactured color sample cards and other color merchandising tools for the paint industry. Paint manufacturers and sellers contracted with Colwell to provide color coded strips, cards, and brochures featuring the various shades of Colwell’s paints. The sample cards were placed on display racks with the paints to aid customers in choosing colors of paint. Three of Colwell’s four paint sample products were “Pick-n-Pull inventory.” These products got their name from the way in which the products were prepared for sale. After their production, the cards were separated into groups of ten to fifteen identical cards and packaged in small plastic wrappers. The wrapped card packages were then stored in boxes or cartons in a company warehouse. When a customer made an order, Colwell employees pulled the requested samples from the storage cartons and shipped the samples to the customer. Colwell’s fourth product, “OD Unopened Cartons,” also consisted of paint sample strips and cards, but this product was packaged for final shipment at the manufacturing line.³³⁸

For the purposes of the March 1, 1994 property tax assessment, Colwell claimed “that its entire inventory of color sample strips was exempt under the interstate commerce exemption.”³³⁹ The hearing officer granted the exemption with regards to the OD Unopened Cartons items, but denied the exemption for the Pick-n-Pull inventory.³⁴⁰ The ISBTC accepted the hearing officer’s recommendations. In addition to Colwell’s paint sample products, Colwell marketed a color code system known as “ColorCurve”, which was a method of identifying color numerically as opposed to visually. Colwell’s inventory of ColorCurve products consists of color atlases which mapped out the system for manufacturers and swatch books with removable samples for designers and architects. Except for a de minimus amount, Colwell manufactured its entire ColorCurve inventory from 1987 to 1989 at a total cost of approximately \$1.5 million. Sales did not match expectations. Colwell presented evidence to show that at the current rate of sale, it would take from 20 to 100 years to sell these products. After several consecutive years of poor sales and after consultation with its professional accountants, Colwell determined in 1995 to write down the

335. *Id.*

336. *Id.* at 1381-83.

337. 680 N.E.2d 892 (Ind. T.C. 1997).

338. *Id.* at 893.

339. *Id.* at 893-94.

340. *Id.* at 894.

value of the inventory. Colwell's accountants determined that the inventory had an estimated realizable value of only \$835,320. Despite the poor sales and Colwell's decision to write down the value of its ColorCurve inventory, at no point did Colwell offer these products for sale below cost. Colwell stated that Colwell did not lower its prices below cost because the demand for the product appeared to be relatively inelastic.³⁴¹ After a hearing on the matter, the ISBTC issued its final determination rejecting the write-down. The ISBTC finally assessed Colwell's entire inventory, including the ColorCurve products, at \$4,068,960, adding an \$850 penalty.³⁴²

Both before the ISBTC and the court, Colwell claimed that Colwell's Pick-n-Pull inventory was exempt from personal property tax under the interstate commerce exemption provided in section 6-1.1-10-29 of the Indiana Code for two reasons. First, Colwell contended that the items comprising Colwell's Pick-n-Pull inventory were exempt under subsection 6-1.1-10-29(b).³⁴³ Colwell argued that "the 'original packages' for the Pick-n-Pull items were the polyethylene wrappers holding ten to fifteen sample paint cards."³⁴⁴ Under this view, the original packaging for the Pick-n-Pull inventory is never disturbed. Thus, Colwell contended that these items were stored and remained in their original packages for the purpose of shipment to an out-of-state destination.³⁴⁵ The court disagreed with Colwell and observed that the applicable regulations define "original package" as "the box, case, bale, skid, bundle, parcel, or aggregation thereof bound together and used by the seller, manufacturer, or packer for shipment."³⁴⁶

The court reasoned that "Colwell does not use the plastic wrappers for shipping its products within the meaning of the regulation."³⁴⁷ The court stated that the issue is not whether the packets could be used for shipping the taxpayer's products, but rather, whether the packets are in fact used for that purpose. Therefore, the court concluded that Colwell was not entitled to an interstate commerce exemption under subsection 29(b).³⁴⁸

Colwell next argued that even if Colwell's Pick-n-Pull inventory was not exempt because the products did not remain in their original packages, the items were exempt under section 6-1.1-10-29(c) of the Indiana Code, because the products' value would be impaired if the products were stored in the products' original packages.³⁴⁹ The dispute centered on Colwell's claim that the value of the Pick-n-Pull inventory would be impaired if the inventory was stored in its original packaging. In support of Colwell's contention, Colwell presented

341. *Id.*

342. *Id.* at 895.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 4.2-12-5(d) (1992)).

347. *Id.*

348. *Id.* at 896.

349. *Id.*

evidence that its Pick-n-Pull method of marketing was substantially more cost effective than prepackaging its products. Testimony indicated that in 1982 and 1983, Colwell sold prepackaged color sample strips to Home Depot stores which asked Colwell to discontinue the practice because more than half of the cards were going unused. Further testimony presented by Colwell's witness revealed that prepackaging Colwell's inventory of paint samples rendered it "unsellable." In addition, Colwell submitted an affidavit from an executive of Ace Hardware, Inc., in which an executive stated that "[i]f Colwell/General would offer Ace [Hardware] prepackaged [display replacement strip packages] prior to an actual store's order, Ace [Hardware] would not be willing to pay the same price that it pays now for the product because much of the order would be wasted" and stated that Ace Hardware "would pay a lesser price."³⁵⁰

However, the court held that Colwell's evidence failed to demonstrate the sort of impairment contemplated by the general assembly when it enacted subsection 29(c)(2). Colwell contended that the general assembly intended to exempt two distinct categories of goods: one set that would be physically damaged if stored in original packaging; and another that, although not adversely affected in a physical sense by such storage, could be marketed more profitably if not stored in original packaging. In this case, it is more likely that the general assembly intended the notions of damage to the goods and the impairment of their value as synonymous descriptions rather than distinct or alternative categories. The court held that subsection (c)(2) required a "showing that the goods themselves would be damaged or impaired in a physical way by storing them in their original packages."³⁵¹

Were this court to read subsection (c)(2) as Colwell suggests, the subsection itself would be rendered practically meaningless. The court reasoned that it would be operative only in the unlikely event that a taxpayer chose to store its goods in original packages despite the fact that method of operation was not cost effective. The court further noted that inasmuch as Colwell "failed to adduce any evidence that its sample paint strips would have been damaged or impaired in this way, it is not entitled to an exemption on this claim."³⁵²

With respect to the ColorCurve inventory, Colwell argued that the ISBTC should have permitted Colwell to write down the value of its inventory to the lower of cost or market for the purposes of Indiana property tax since Colwell reduced the recorded value of the inventory for internal accounting purposes. In support of this claim, Colwell pointed to the fact that sales of the ColorCurve inventory have been dismal. In fact, evidence showed that Colwell will probably still be trying to sell this inventory well into the 21st century. A letter from its accountants was also submitted stating that because of its poor sales performance, generally accepted accounting principles required the company to discount the value of those products.³⁵³ In its final determination, the ISBTC

350. *Id.* at 897.

351. *Id.*

352. *Id.*

353. *Id.* at 898.

denied Colwell's write-down on the grounds that Colwell failed to produce sufficient objective evidence that its goods should be valued below cost. The ISBTC explained: "Regardless of whose definition one uses [to define market value], the plain fact is that there must be some evidence that the market value of the inventory is less than its cost. . . ."³⁵⁴ The letter from the accounting firm and the testimony concerning the deterioration of the colors may be believable, but it was Colwell's responsibility to provide evidence to the ISBTC to show that the amount of ColorCurve inventory write-down was proper. "The clear focus of the ISBTC's determination was that 'Colwell failed to provide any basis to explain the calculation of the \$650,000 write-down.'"³⁵⁵ The court agreed with the ISBTC.

On proper proof, the ISBTC would have permitted Colwell to value inventory at "the lower of cost or market."³⁵⁶ The regulations required that taxpayers value inventory at the cost of the goods "as recorded on the regular books and records of the taxpayer," and "[i]f a taxpayer uses the lower of cost or market for valuing inventory for book accounting purposes, this method is allowable for Indiana property tax purposes."³⁵⁷ Establishing that its inventory has probably lost value is, however, only half the battle for the taxpayer. The taxpayer must also prove by objective evidence that the value of the goods is less than its cost. In this case, the court stated that Colwell failed to introduce any evidence explaining its proposed \$650,000 write-down.³⁵⁸ It also observed that the letter from Colwell's accountants simply stated "without explanation or documentation that the 'estimated realizable value' of the inventory as of the end of 1993 was \$620,000, and an additional \$30,000 was subtracted from the inventory's value for January and February 1994."³⁵⁹ This, according to the court, fell short of the objective evidence required to support such a write-down.³⁶⁰ A general showing of a decrease in value is not sufficient.

2. *Sony Music Entertainment, Inc. v. Indiana State Board of Tax Commissioners*.³⁶¹—Sony Music was a Delaware corporation with its principal place of business in New York. Sony Music manufactured audio compact discs and sold them at wholesale across the nation. Because Sony Music's manufacturing facilities did not have sufficient capacity to meet the demand for Sony Music's products, Sony Music entered into an agreement with Digital Audio Disc Corporation ("DADC") to produce additional discs. DADC has its principal facilities in Indiana. Both Sony Music and DADC were subsidiaries of Sony Corporation of America. The compact discs at issue were designed to be sold in plastic jewel cases with front and back liners which were analogous to

354. *Id.*

355. *Id.* at 898-99.

356. *Id.* at 899 (citing IND. ADMIN. CODE tit. 50, r. 4.2-5-3 (1992)).

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. 681 N.E.2d 800 (Ind. T.C. 1997).

album covers, featuring various designs, graphics, and pictures. The discs often came with short booklets containing promotional information, lyrics, or other information. Once a disc was placed in a tray in a jewel case with the appropriate liner and booklet, either the case was shrink wrapped alone or the case was placed in a longbox, and the case and longbox were shrink wrapped together. Longboxes were printed cardboard sleeves that are folded and glued around the jewel cases in order to make them compatible with the old record album displays in retail shops. Under the agreement between DADC and Sony Music, DADC produced the actual discs as well as most of the plastic trays and jewel cases. Sony Music supplied the booklets, liners, and longboxes (collectively, the "artwork"). Sony Music purchased the artwork from out-of-state suppliers, and all of the design and production work on the pieces was completed outside Indiana. DADC was responsible for preparing the discs for sale by placing the artwork in the jewel cases with the discs and putting many of the cases in longboxes. DADC would then pack twenty-five to thirty-five fully assembled compact discs into cardboard boxes for shipment to locations throughout the United States.³⁶²

In March 1993, Sony Music had close to \$4 million in artwork stored in DADC's Indiana warehouse. More than 52% of the pieces were booklets and liners; over 47% were longboxes; and the remainder contained miscellaneous items. When Sony Music filed its 1993 business personal property tax return for this property, Sony Music claimed an exemption for 98.6% of these items under section 6-1.1-10-29.3 of the Indiana Code on the grounds that these items were ready for transshipment out of state, except for repackaging. During the twelve months preceding March of 1993, Sony Music shipped slightly more than \$45 million in merchandise from DADC, 98.12% of which was shipped out of state.³⁶³

After performing an audit, a hearing officer for the ISBTC found that "the artwork was not merely being stored for transshipment, but rather the booklets, liners, and longboxes constituted 'raw materials' that had to be assembled with the compact discs to form a saleable good."³⁶⁴ Thus, the officer concluded that the inventory of artwork was not exempt under section 6-1.1-10-29.3 of the Indiana Code and the officer recommended an assessment of \$804,530 but later increased that figure to \$844,760.³⁶⁵ After a hearing, the ISBTC affirmed this assessment and Sony Music timely filed notice of intent to appeal, claiming the exemption from Indiana's personal property tax under section 6-1.1-10-29.3 of the Indiana Code.³⁶⁶

362. *Id.* at 800-01.

363. *Id.* at 801.

364. *Id.*

365. *Id.*

366. *Id.* The applicable Indiana statute provided:

Personal property shipped into Indiana is exempt from property taxation if the owner or possessor is able to show by adequate records that the property:

(1) is stored in an in-state warehouse for the purpose of transshipment

Based on these facts, the court stated the issue as whether DADC's assembling of the discs, jewel cases, artwork, and longboxes constitutes more than "repackaging." Sony Music argued that the artwork is exempt by the plain meaning of the statute and pointed out that Webster's Dictionary defines "repackage" in part as "to package again or anew."³⁶⁷ After examining variations of the term "packaging", the court stated that in order to come within the scope of the statutory exemption, the goods in question must be stored in their original packages for the purpose of shipment or transshipment out of state and the term "original package" refers to the container in which the goods are shipped to or placed in the storage facility.³⁶⁸ The applicable regulations define the term "original package" as "the box, case, bale, skid, bundle, parcel, or aggregation thereof bound together and used by the seller, manufacturer, or packer for shipment."³⁶⁹ Based on these provisions, the court concluded that if Sony Music had shipped the goods into Indiana and did no more than "repackage" the goods for transshipment out of state, Sony Music would have been entitled to the exemption. But for this purpose, the term "repackage" must refer to repackaging in the sense of transferring to a different container for the purpose of transshipment and not in the sense of combining different parts or components of a product for sale.³⁷⁰

The court observed that the distinction between packaging for shipment and packaging for sale is central to the analysis under the interstate commerce exemptions of Indiana's property tax. The court determined that Sony Music's activities were "designed, not to facilitate transshipment, but to bring together the separate components of Sony Music's final saleable product, a shrink-wrapped or boxed compact disc, complete with promotional booklet and liners."³⁷¹ Specifically, the court determined that DADC did more than prepare Sony Music's compact discs and artwork for transshipment since DADC assembled the goods for sale to Sony Music's ultimate customers, which activities are processing activities and not merely repackaging activities under section 6-1.1-10-29.3 of the Indiana Code. Therefore, the court held that Sony Music was not entitled to an interstate commerce exemption from the Indiana property tax.³⁷²

to an out-of-state destination; and

(2) is ready for transshipment without additional manufacturing or processing, except repackaging.

IND. CODE § 6-1.1-10-29.3 (1996).

367. *Id.* at 802 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1923 (1981)).

368. *Id.* at 803.

369. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 4.2-12-5(d) (1992)).

370. *Id.*

371. *Id.* at 804.

372. *Id.* at 805-06.

D. Indiana Property Taxes—Real Property Taxes

1. *Boehm v. Town of St. John*.³⁷³—*Boehm* was an appeal by the ISBTC from the decision of the Indiana Tax Court holding that the Indiana Constitution requires a system of property assessment and taxation based on market value and that, because Indiana's statutory system of taxation valued real property on a basis other than market value, the system was unconstitutional.³⁷⁴ The Indiana Supreme Court reversed that conclusion and remanded to the Indiana Tax Court the taxpayers' other claims which the Indiana Tax Court did not address.³⁷⁵ The case arose from the consolidation of several original tax appeals by the petitioners-appellants in the Indiana Tax Court challenging the past and future methods by which Indiana assesses the value of real property for taxation purposes.³⁷⁶

Asserting multiple issues, the taxpayers contended that the then current system resulted in a non-uniform, unequal, unjust and discriminatory valuation and assessment of Indiana real property in violation of article 1, section 23 and article 10, section 1 of the Indiana Constitution and of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.³⁷⁷ The taxpayers requested the following relief from the Indiana Tax Court:

(1) declare Indiana Code Section 6-1.1-31-6(c) unconstitutional if interpreted to prevent the [ISBTC] from adopting market value or a uniform percentage thereof as the standard of value of real property; (2) require the [ISBTC] to adopt a system of assessment that treats equally and uniformly persons who are similarly situated in terms of the fair market value of the real property they own; and (3) review and equalize the assessments and valuations within St. John and the other townships in Indiana.³⁷⁸

The Indiana Tax Court addressed only the following issue, finding it to be dispositive: “Whether Art. 10, § 1 of the Indiana Constitution requires that all real property assessments be based on market value.”³⁷⁹ The Indiana Supreme observed that article 10, section 1 of the Indiana Constitution provides, in pertinent part, “The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal.”³⁸⁰

The Indiana Tax Court held that “uniform and equal” mandates “each

373. 675 N.E.2d 318 (Ind. 1996).

374. *Id.* at 319 (citing *Town of St. John v. State Bd. of Tax Comm'rs*, 665 N.E.2d 965 (Ind. T.C. 1996)).

375. *Id.*

376. *Id.* at 319-20.

377. *Id.* at 320.

378. *Id.*

379. *Id.* (quoting *Town of St. John*, 665 N.E.2d at 966).

380. *Id.* (quoting IND. CONST. art. 10, § 1(a)).

taxpayer's property wealth bear its proportion of the overall property tax burden,"³⁸¹ "that 'just value' means fair market value,"³⁸² and that the general assembly and the ISBTC must implement market value and "bring the state's system of real property taxation into compliance with Article 10, § 1 of the Indiana Constitution" by March 1, 1998.³⁸³ After looking to the intent of the framer's of the Indiana Constitution, the Indiana Supreme Court agreed that the purpose and intent of article 10, section 1, was to require uniform and equal assessment and taxation and just valuation, and that such assessments and taxation are subject to judicial review. The Indiana Supreme Court also observed that perfect uniformity in the method of assessment was not required; rather the Indiana Constitution required a just valuation of all property, so that the burdens may be distributed with uniformity, and the function of implementing this requirement was a legislative one. The Indiana Supreme Court noted that the rate must be uniform and equal, but that the Indiana Constitution authorized the general assembly to allow a variety of methods to secure just valuation. Therefore, the Indiana Supreme Court affirmed the Indiana Tax Court's finding that the general assembly must provide a uniform and equal rate of property assessment and taxation based on property wealth. However, the Indiana Supreme Court overruled the Indiana Tax Court's finding that the Indiana Constitution requires an exclusive, comprehensive, absolute, and precise market value system.³⁸⁴

Chief Justice Shepard, dissenting, observed that the submissions by the parties indicated that only three methods were recognized for valuing real property. reproduction cost, comparison of sales, and income capitalization. The Chief Justice also observed that the majority's holding—that the Indiana Constitution did not require market value assessment, but only "uniform and equal" assessment and taxation—raised the question of uniform and equal with respect to what.³⁸⁵

2. *Bender v. Indiana State Board of Tax Commissioners*.³⁸⁶—In *Bender*, the petitioner owned real property in Indiana which consisted of four units, side-by-side, each sharing a common wall with an adjoining unit. Such property is commonly referred to as a "row-type dwellings." For the purpose of the 1989 general reassessment,³⁸⁷ the property was assessed under the Residential Pricing Schedule with an adjustment for a row-type dwelling. In June of 1992, Bender filed Form 133 Petition for Correction of Errors, in which Bender alleged that the General Commercial Residential Pricing Schedule should have been employed instead of the residential schedule because the units were leased and not owned by the occupants. Bender justified the use of Form 133 on the grounds that this

381. *Id.* (quoting *Town of St. John*, 665 N.E.2d at 970).

382. *Id.* (quoting *Town of St. John*, 665 N.E.2d at 973).

383. *Id.* (quoting *Town of St. John*, 665 N.E.2d at 975).

384. *Id.*

385. *Id.* at 328-29.

386. 676 N.E.2d 1113 (Ind. T.C. 1997).

387. *Id.* (citing IND. CODE ANN. § 6-1.1-4-4(a) (1989)).

was a “mathematical error.” The County Board of Review denied Bender’s Form 133 Petition and Bender timely appealed the denial to the ISBTC. The ISBTC rejected Bender’s petition and issued a final assessment determination in October of 1995, setting the assessed value for Bender’s real property at \$55,000. One month later, Bender filed an original tax appeal in the court challenging the ISBTC’s final determination.³⁸⁸

Prior to January 1994, a taxpayer could challenge a ISBTC determination in one of three ways:

(1) within thirty days of a general reassessment, a taxpayer could file a Form 130/131 Petition for Review of Assessment challenging both subjective and objective errors; (2) by March 31st of years in which a general reassessment was not done, a taxpayer could challenge subjective and objective errors through a Form 134 Petition for Reassessment; or (3) at any time, a taxpayer could file a Form 133 Petition for Correction of Errors challenging only objective errors in the assessment.³⁸⁹

The *Bender* court observed that a taxpayer challenging a property assessment bears the responsibility of using the appropriate method, and where an improper avenue is pursued, the ISBTC’s determination will be upheld.³⁹⁰ The petition at issue in this case was the Form 133 Petition for Correction of Errors, which was governed by section 6-1.1-15-12 of the Indiana Code. This statute states: “[A] county auditor shall correct errors which are discovered in the tax duplicate for any one (1) or more of the following reasons: . . . (7) There was a mathematical error in computing the taxes or penalties on the taxes.”³⁹¹ Therefore, the court determined that the “only errors subject to correction by Form 133 are those which can be corrected without resort to subjective judgment.”³⁹² Thus, the issue was whether an alleged error in choosing one pricing schedule over another constitutes an objective, mathematical error for the purposes of section 6-1.1-15-12(a)(7) of the Indiana Code and Form 133.

Bender claimed that he rented out the units at issue as apartments for commercial purposes rather than using them as residences and that under the applicable regulations, the property was classified on the basis of its “predominant current use”³⁹³ and that apartments are assigned an assessment value under the General Commercial Residential Pricing Schedule.³⁹⁴ Additionally, Bender claimed, that since this error (of choosing the wrong classification for Bender’s property) resulted in an inflated tax assessment, the

388. *Id.*

389. *Id.* at 1114 (citing *Williams Indus. v. State Bd. of Tax Comm’rs*, 648 N.E.2d 713 (Ind. T.C. 1995); *Reams v. State Bd. of Tax Comm’rs*, 620 N.E.2d 758 (Ind. T.C. 1993)).

390. *Id.* (citing *Williams*, 648 N.E.2d at 718; *Reams*, 620 N.E.2d at 761).

391. *Id.* (citing IND. CODE ANN. § 6-1.1-15-12(a) (1989)) (emphasis omitted).

392. *Id.* (citations omitted).

393. *Id.* at 1115 (citing IND. ADMIN. CODE tit. 50, r. 2.1-4-2(b) (1992)).

394. *Id.* at 1115-16 (citing IND. ADMIN. CODE tit. 50, rr. 2.1-4-4, 2.1-4- 7(c) (1992)).

error constituted a mathematical error. However, the court disagreed, stating that the choice between pricing schedules is not merely a mathematical question and that the choice between pricing schedules is not objective since the selection involves a judgment on the part of the assessor. The court determined that the assessor must use the assessor's judgment in determining which schedule to use and such decision is not a decision automatically mandated by a straightforward finding of fact.³⁹⁵ Thus, the court held Form 133 was not the appropriate petition with which to challenge the County Board of Review's decision.³⁹⁶

3. *Corey v. State Board of Tax Commissioners*.³⁹⁷—In this case, the petitioners (Coreys) owned 23.72 acres of land and improvements in Montgomery County, Indiana. In addition to Coreys' home, the property included an outbuilding, a swimming pool, and a tennis court. Coreys' property was reassessed and a hearing on the reassessment was held in September 1994. Coreys claimed that after Coreys built the house, there was a hog operation built across the highway from them and there was no way in which Coreys could utilize the Corey property as intended because on certain days the stench coming from the hog operation prevented Coreys from enjoying their property. The Coreys could not entertain outdoors, hang laundry outside to dry, use the tennis court or swimming pool, or leave the windows open. Two jars, which Coreys stated contained air samples taken in Coreys' front yard, were presented to the hearing officer as evidence in support of this claim. At the conclusion of the hearing, the hearing officer drove to Coreys' residence to view the property. The hearing officer took measurements and inspected the property, but he detected no odor during the one and a half hours he spent at Coreys' home. After leaving the property, the hearing officer drove close to the hog facility. He did not get out of his car or go onto the facility property, but he did not smell any odor. This was the hearing officer's only visit to Coreys' property and to the hog facility. Coreys contended that their residence had been assessed at the wrong grade—B+1 instead of C+1 (comparable homes in the area were graded C+1).³⁹⁸

The court observed that regulations were clear that building grade determinations require "careful consideration and sound judgment on the part of the assessor"³⁹⁹ and that the assessor was to make adjustments "to account for variations in the quality of materials, workmanship, and design."⁴⁰⁰ The hearing officer identified particular features which he observed from the outside (because the Coreys would not allow him to go inside the house) that supported his determination of a B+1 grade. These included architectural elements, roof lines, windows, brick and woodwork. Coreys did not dispute this testimony. Thus, the court held that in such circumstances taxpayers have no legitimate complaint that some other features might justify a lower grade, because taxpayers may not claim

395. *Id.* at 1116.

396. *Id.*

397. 674 N.E.2d 1062 (Ind. T.C. 1997).

398. *Id.* at 1064.

399. *Id.* (quoting IND. ADMIN. CODE tit. 50, r 2.1-4-3(f) (1992) (now repealed)).

400. *Id.* at 1064-65 (quoting IND. ADMIN. CODE tit. 50, r 2.1-4-3(f) (1992) (now repealed)).

error in an assessment due to their own actions.⁴⁰¹

However, with respect to the desirability rating of the house, Coreys asserted that the ISBTC, in their assessment of the Coreys' residential property, did not properly consider the negative effect that a nearby hog facility had on their neighborhood. The court observed that under the ISBTC's regulations, neighborhood desirability constitutes "a composite judgment of the overall desirability based on the condition of agreeable living and the extent of residential benefits arising from the location of the dwelling."⁴⁰² Accordingly, the court stated: (1) an evaluation of neighborhood desirability looks beyond the improvement itself to external features of the property's location that may affect its value; (2) the rating level describes the balance between desirable and undesirable factors in the improvement's location; and (3) Coreys bear the burden of proving that the neighborhood desirability rating is incorrect.⁴⁰³ The court found that Coreys met this burden. Coreys provided the hearing officer with two jars, redolent with swine, which jars remained unopened, but a witness for the ISBTC conceded at trial that the jars would have smelled bad had they been opened. In meeting their burden of proof, Coreys placed the burden of going forward on the ISBTC to show that the determination was correct. Thus, the only evidence before the court (the Coreys' evidence) was inconsistent with the "average" neighborhood desirability rating. Therefore, the court held that in the absence of evidence contradicting Coreys' claim, the ISBTC's rating is arbitrary and capricious and unsupported by substantial evidence.⁴⁰⁴

E. Indiana Sales And Use Taxes

1. *J & J Vending, Inc. v. Indiana Department of State Revenue.*⁴⁰⁵—J & J Vending, Inc. (J & J) was an Indiana corporation in the business of selling food through vending machines. J & J stocked its machines with food items and then deployed the machines on the property of other entities and businesses. J & J did not sell food on or near J & J's own property. J & J employees visited the machines to empty the cash boxes, restock food, and service the machines. Consequently, Indiana sales tax was not collected separately from the purchase price of the food. Instead, J & J charged a composite price for each item of food sold and paid the Indiana sales tax from the vending machines' gross receipts. J & J filed claims for refund of certain Indiana sales taxes, which claims were denied by the IDSR. Therefore, J & J appealed the IDSR's denials.⁴⁰⁶

The court first reviewed the basic provisions of the Indiana sales tax law,

401. *Id.* at 1065 (citing State Bd. of Tax Comm'rs v. South Shore Marina, 422 N.E.2d 723, 730 (Ind. Ct. App. 1981)).

402. *Id.* (quoting IND. ADMIN. CODE tit. 50, r 2.1-3-3(m) (1992) (now repealed)).

403. *Id.* at 1065-66 (citing Herb v. State Bd. of Tax Comm'rs, 656 N.E.2d 890, 893 (Ind. T.C. 1995)).

404. *Id.* at 1066.

405. 673 N.E.2d 1203 (Ind. T.C. 1996).

406. *Id.* at 1205.

including the following provision which allowed exemptions from the Indiana sales taxes for food for human consumption.⁴⁰⁷ The term “food for human consumption” does not include certain food items and transactions, which remain subject to taxation.⁴⁰⁸ J & J did not dispute that as a retail merchant, it had to collect sales tax on its sales.⁴⁰⁹ J & J claimed that it was entitled to the exemption available to other merchants for sales of “food for human consumption” under the provisions of section 6-2.5-5-20(b) of the Indiana Code. The two issues presented to the court were (1) whether items sold through vending machines were subject to Indiana’s gross retail tax; and, (2) whether the Indiana gross retail tax, as applied to vending machine operators, violated the Equal Privileges or Immunities clause of the Indiana Constitution or the Equal Protection clause of the federal Constitution.

With respect to the first issue, the court stated that the plain language of the

407. “Food for human consumption” included:

- (1) Cereals and cereal products;
- (2) Milk and milk products, including ice cream;
- (3) Meat and meat products;
- (4) Fish and fish products;
- (5) Eggs and egg products;
- (6) Vegetables and vegetable products;
- (7) Fruit and fruit products, including fruit juices;
- (8) Sugar, sugar substitutes, and sugar products;
- (9) Coffee and coffee substitutes;
- (10) Tea, cocoa, and cocoa products;
- (11) Spices, condiments, extracts, and salt;
- (12) Oleomargarine; and
- (13) Natural spring water.

Id. (citing IND. CODE ANN. § 6-2.5-5-20(b)).

408. Food items that *remain* subject to taxation include:

- (1) Candy, confectionery, and chewing gum;
- (2) Alcoholic beverages;
- (3) Cocktail mixes;
- (4) Soft drinks, sodas, and other similar beverages;
- (5) Medicines, tonics, vitamins, and other dietary supplements;
- (6) Water (except natural spring water), mineral water, carbonated water, and ice;
- (7) Pet food;
- (8) Food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant;
- (9) Meals served by a retail merchant off the merchant’s premises;
- (10) Food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant’s premises, including food sold on a “take out” or “to go” basis; and
- (11) *Food sold through a vending machine or by a street vendor.*

Id. at 1205-06 (citing IND. CODE ANN. § 6-2.5-5-20(c)).

409. *Id.* at 1206 (citing IND. CODE ANN. §§ 6-2.5-2-1, 6-2.5-4-1 (West 1989)).

statute shows that vending machine sales are not exempt from the Indiana sales tax, because “food sold through a vending machine” is specifically excluded from the definition of “food for human consumption.”⁴¹⁰ With respect to the issue involving the Equal Privileges or Immunities clause of the Indiana Constitution and the Equal Protection clause of the federal Constitution, the court observed that the Indiana Constitution states: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”⁴¹¹ Then, the court stated that there was a two-step analysis in determining the constitutionality of a statute granting unequal privileges or immunities.⁴¹² The court stated that, “[f]irst, the disparate treatment ‘must be reasonably related to inherent characteristics which distinguish the unequally treated classes.’ Second, those similarly situated must be given the same preferential treatment—uniformly and equally.”⁴¹³

Under this two-step process, the court first determined whether the exclusion of vending machine sales from the exemption is reasonably related to their distinctive characteristics, and the court stated that the exclusion was reasonably related to these distinctive characteristics.⁴¹⁴ The court observed that the general assembly decided to exempt only staple items purchased while grocery shopping, which tends to involve the purchase of a variety of foods to be prepared at home and consumed as part of meals over an extended period of time, so as to help less fortunate individuals who are less likely to spend their limited resources dining out or on single-portion purchases.⁴¹⁵ The court also observed that taxing single-serving portions does not add to the regressivity of the sales tax, and exempting such items would unnecessarily decrease the revenue obtained from such a tax.⁴¹⁶ Because vending machine sales commonly involved isolated purchases of single-serving, prepackaged items, most often for immediate consumption, the general assembly excluded vending machine sales from the exemption.⁴¹⁷

The court then examined whether the vending sales classification was being utilized consistently. The court concluded that vending machines are in a class separate from convenience and grocery stores.⁴¹⁸ Furthermore, the IDSR’s stated policy is to tax even staple food items sold in convenience and grocery stores “if they are sold in small quantities and, therefore, are prepared for immediate consumption.”⁴¹⁹ With respect to the Equal Protection clause of the United States Constitution, this clause provides that no state shall “deny to any person

410. *Id.* (citing IND. CODE ANN. § 6-2.5-5-20(c)(11)).

411. *Id.* at 1207 (quoting IND. CONST. art. 1, § 23).

412. *Id.* (citing *Collins v. Day*, 644 N.E.2d 72, 78-80 (Ind. 1994)).

413. *Id.* (quoting *Collins*, 644 N.E.2d at 80).

414. *Id.*

415. *Id.* at 1207-08.

416. *Id.* at 1208.

417. *Id.*

418. *Id.*

419. *Id.* at 1208 n.3 (quoting IND. ADMIN. CODE tit. 45, § 2.2-5-39 (1992)).

within its jurisdiction the equal protection of the laws.”⁴²⁰ The court added that this provision “does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.”⁴²¹ For these reasons, the court concluded that the separate classification and treatment of vending machine sales is rationally related to legitimate policies supporting the exemption statute and that J & J had not been treated differently from other vending machine operators. Therefore, there was no violation of J & J’s federal equal protection guarantees and J & J Vending was denied an Indiana sales tax refund.⁴²²

2. *In Mid-America Energy Resources, Inc. v. Indiana Department of State Revenue.*⁴²³—In this case, the petitioner (“MAER”) is an Indiana corporation providing air conditioning to downtown Indianapolis businesses, such as the RCA (Hoosier) Dome, IUPUI facilities, Indiana Government Center, and Indianapolis Star/News building. MAER was the sister company of Indianapolis Power and Light Company with IPALCO enterprises being the common parent company.⁴²⁴

MAER operated a central processing plant where city water is chilled to forty degrees Fahrenheit using steam turbine driven chiller compressors, a refrigerant condenser, an expansion valve, and an evaporator. The water was then chemically treated to prevent corrosion, deposition, and microbiological growth. The chilled and treated water was distributed to customers through an underground distribution system. MAER’s customers used the chilled water to cool and condition the air in their buildings. Once the water was fifty-two degrees Fahrenheit, it is returned to MAER through the same underground distribution system. Upon receiving the warmed and used water, MAER re-treated and re-chilled the water to be sent back out to customers. MAER charged its customers based on the quantity of water delivered to the customer, as well as the temperature differences in the water that is returned. This relationship was converted to “ton hours” and is the basis for the consumption charge paid by the consumer. If the consumer did not return the same quantity of water that was delivered, a “lost water charge” was incurred. MAER is a registered retail merchant that collected sales tax on the sales made to non-exempt customers and remitted such monies to the IDSR.⁴²⁵

During the tax years 1990, 1991, and 1992, MAER purchased equipment and consumables for its business but paid no sales and use tax. MAER believed it was exempt from such taxation under the equipment exemption,⁴²⁶ the

420. *Id.* at 1208 (quoting U.S. CONST. amend XIV, § 1).

421. *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

422. *Id.*

423. 681 N.E.2d 259 (Ind. T.C. 1997).

424. *Id.* at 260.

425. *Id.*

426. *Id.* at 261 (citing IND. CODE ANN. § 6-2.5-5-3 (West Supp. 1996)).

consumption exemption,⁴²⁷ or as a utility.⁴²⁸ In December 1993, the IDSR notified MAER that MAER owed retail sales tax plus interest for the tax years 1990, 1991, and 1992, totaling \$702,664.04. MAER protested the assessment in February 1994. A hearing was held, and the IDSR issued a Letter of Findings eight months later, denying MAER's challenge. MAER filed a rehearing request one month later which request was granted, but the second Letter of Findings also provided no relief.

MAER filed this original tax appeal one month later to set aside the IDSR's final determination. Indiana imposed an excise tax on tangible personal property stored, used, or consumed in Indiana.⁴²⁹ Several exemptions from the use tax were available to taxpayers,⁴³⁰ including what are collectively known as the industrial exemptions.⁴³¹

With respect to the equipment exemption, MAER did not pay sales tax on the equipment it purchased to operate its chilling and treatment facility because MAER believed it was exempt.⁴³² The IDSR denied MAER the exemption because it found that MAER was providing a cooling service. The IDSR argued that MAER's chilling of water did not significantly change the water, and thus no "production" or "processing" occurred and no "other tangible personal property" was produced. The court disagreed observing that the equipment exemption provided: "Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property."⁴³³ To qualify for this exemption, taxpayers had to meet two requirements. First, the taxpayer had to acquire the property for the taxpayer's direct use. Second, the taxpayer had to use that property in direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. These two tests compose what is referred to as the double direct standard.⁴³⁴

The parties contested whether MAER's operation constituted "direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property."⁴³⁵ The court observed that the equipment exemption required taxpayers to show that the taxpayers are

427. *Id.* (citing IND. CODE ANN. 6-2.5-5-1).

428. *Id.* (citing IND. CODE ANN. §§ 6-2.5-4-5, 6-2.5-5-12).

429. *Id.* (citing IND. CODE ANN. § 6-2.5-3-2 (West Supp. 1996)).

430. *Id.* (citing IND. CODE ANN. §§ 6-2.5-5-1 to -33 (West Supp. 1989)).

431. *Id.* (citing *Harlan Sprague Dawley v. Indiana Dep't of State Revenue*, 605 N.E.2d 1222, 1224 (Ind. T.C. 1992)).

432. *Id.*

433. *Id.* at 262 (quoting IND. CODE ANN. § 6-2.5-5-3 (no year given)).

434. *Id.* (citing *Department of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520, 525 (Ind. 1983)).

435. *Id.* (quoting IND. CODE ANN. § 6-2.5-5-3).

engaged in “production.”⁴³⁶ “Production” can occur through manufacturing, processing, or the other activities which are listed in the exemption,⁴³⁷ but that it does not matter whether the taxpayer’s operation fits within a particular category, such as processing or manufacturing.⁴³⁸ The court stated that the term “production” is defined broadly in this context and focuses on the creation of a marketable good.⁴³⁹ The court determined that MAER is engaged in the “direct production” of “other tangible personal property.” The court observed that in order to cool water to forty degrees, MAER used steam-driven turbine chillers to remove heat, a form of energy, from the water. This process created a significant change in the properties of water. The chilled water was then pumped through a primary chiller loop where the chilled water was chemically treated to prevent corrosion, deposition, and microbiological growth. MAER processed ordinary water into water capable of cooling and conditioning air in buildings. MAER’s 40 degree water had utility and properties that the water previously lacked. Thus, the court reasoned, the city water did not retain its original state once the water was chilled and treated. The court then concluded that MAER’s operation created a new and marketable good, or in the language of the statute, produces “other tangible personal property.”⁴⁴⁰

With respect to the consumption exemption, MAER also claimed an exemption for the water treatment chemicals and steam service which MAER purchased. The consumption exemption provided:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for his direct consumption as a material to be consumed in the direct production of other tangible personal property in his business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arobriculture. This exemption included transactions involving acquisitions of tangible personal property used in commercial printing as described in IC 6- 2.1-2-4.⁴⁴¹

As one of the three industrial exemptions, the consumption exemption was treated, in most respects, identically to the equipment exemption.⁴⁴² The court found that MAER consumed the chemicals and steam service in the “direct production” of “other tangible personal property,” and, therefore, is entitled to the consumption exemption.⁴⁴³ With respect to MAER’s alternative claims, the

436. *Id.* (citing *Mechanics Laundry & Supply, Inc. v. Indiana Dep’t of State Revenue*, 650 N.E.2d 1223, 1228 (Ind. T.C. 1995)).

437. *Id.* (citing *Cave Stone*, 457 N.E.2d at 524).

438. *Id.* (citing *Harlan Sprague*, 605 N.E.2d at 1226).

439. *Id.* (citing *Mechanics Laundry*, 650 N.E.2d at 1229; *Harlan Sprague*, 605 N.E.2d at 1228).

440. *Id.* at 263.

441. *Id.* (quoting IND. CODE ANN. § 6-2.5-5-5.1(b)).

442. *Id.* (citing *Harlan Sprague*, 605 N.E.2d at 1227).

443. *Id.* at 264.

court did not fully address MAER's alternative arguments (i.e., that MAER operated as a non-regulated public utility entitled to the utility exemption)⁴⁴⁴ and that MAER constituted a public utility for purposes of section 6-2.5-4-5 or section 6-2.5-5-12 of the Indiana Code. The court concluded that MAER acquired equipment and consumables for direct use in MAER's operations and that MAER's chemical treatment and chilling of water constituted "direct production" of "other tangible personal property" for purposes of the industrial exemptions. The court held that MAER was entitled to claim an exemption from sales and use taxes under both the equipment exemption,⁴⁴⁵ and the consumption exemption.⁴⁴⁶

F. Indiana Property Taxes—Business Real Property

1. *Componx, Inc. v. Indiana State Board of Tax Commissioners*.⁴⁴⁷—The petitioner ("Componx") owned a building which was valued for the March 1, 1993 assessment under the GCI-Light Warehouse model, but was not given the type of "kit" building adjustment described in Bulletins 91-8 and 92-1. Componx disagreed with this assessment and appealed by filing a Form 131 Petition for Review with the Washington County Board of Review. Componx's main claim was that the building should have been classified as an economy "kit" building and should have received the reduction in base rate. The County denied the petition and Componx subsequently appealed to the ISBTC, which also denied the petition for the "kit" adjustment because Componx's building had slight variations from the basic "kit" building.⁴⁴⁸

Componx claimed that although Componx's building varied somewhat from the classic "kit" model, these slight variations in design were not enough to completely disqualify Componx from receiving the reduction. Instead, Componx argued that the modifications could be accounted for by an increase in grade factor. The court also observed that due to the fact that not all pre-engineered "kit" buildings are eligible for the 50% reduction in base rate, the ISBTC issued Instructional Bulletins 91-8 and 92-1 in order to give assessors guidance as to which buildings should receive the reduction and to outline in detail the different variations of "kit" buildings and which deviations from the basic "kit" model can cause buildings to be disqualified from the 50% reduction in base rate.⁴⁴⁹ The court further observed that by comparing the features of the Componx building with those which are listed in the Bulletin, Componx demonstrated that the ISBTC's decision to deny the adjustment was unsupported by substantial evidence.⁴⁵⁰

444. *Id.* (citing IND. CODE ANN. § 6-2.5-5-12).

445. *Id.* (citing IND. CODE ANN. § 6-2.5-5-3).

446. *Id.* (citing IND. CODE ANN. § 6-2.5-5.5.1).

447. 683 N.E.2d 1372 (Ind. T.C. 1997).

448. *Id.* at 1373-74.

449. *Id.* at 1374.

450. *Id.*

For example, the ISBTC's main justification for disallowing the "kit" adjustment for Componx's building rested on the fact that the thickness of the hard steel used in the support system was 3/16 of an inch and that such thickness in hard steel was substantial enough to disqualify the building from receiving the reduction in base rate.⁴⁵¹ However, undisputed testimony at trial by the taxpayer's witness revealed that 3/16 is actually very lightweight. Further, testimony demonstrated that the building possessed even more characteristics that are indicative of the type of building that qualifies for the 50% adjustment and no evidence which offered by the ISBTC to the contrary. Therefore, the court concluded that by meeting its burden of proof, Componx placed the burden of going forward to show that the determination was correct on the ISBTC.⁴⁵² The ISBTC argued that because Componx's building displayed a few additional features, the ISBTC could completely disallow the exemption. However, the court determined that the slight additions to the basic "kit" model could be accounted for by simply raising the grade factor.⁴⁵³ This could be done since none of the variations affect the actual structure of the building. Therefore, the court reversed the ISBTC's decision.⁴⁵⁴

2. *Joyce Sportswear Co. v. State Board of Tax Commissioners.*⁴⁵⁵—Joyce Sportswear Co. ("Joyce") appealed a final determination of the ISBTC which increased the March 1, 1989 assessment for property which Joyce owned. The following three issues were before the court: (1) whether the Lake County Board of Review's assessment of Joyce's property was invalid; (2) whether the ISBTC had the authority in a taxpayer-initiated petition to assess property more than three years prior to its final determination; and, (3) what was the effect of Joyce's motion to withdraw its petition for review during the pendency of proceedings before the ISBTC.⁴⁵⁶

Joyce was a manufacturer of women's apparel which manufacturing facilities were located in Indiana. In 1990, the township assessor assessed the facility and valued the land and the improvements at \$233,970. In March, 1990, Joyce appealed this assessment to the County Board of Review. In April, 1992, the County Board of Review issued its decision. For the tax years 1989 and 1990, the County Board of Review concurred with the original findings of the township assessor, but for the tax year 1991, the County Board of Review increased the total assessment from \$233,970 to \$236,570. One month later, Joyce appealed to the ISBTC. Ultimately, an ISBTC hearing officer heard the case in September 1995, more than three years after Joyce filed its petition for review with the ISBTC. One month later in October, 1995, the hearing officer notified Joyce that the hearing officer would recommend an increase in the assessment to a supervisor. On August 16, 1996, the ISBTC issued its final determination,

451. *Id.*

452. *Id.* at 1375 (citing *Corey*, 674 N.E.2d at 1066).

453. *Id.*

454. *Id.*

455. 684 N.E.2d 1189 (Ind. T.C. 1997).

456. *Id.* at 1190.

assessing the total value of the property at \$318,260 as of March 1, 1989. Joyce filed an appeal with this court, arguing that because the County Board of Review assessed its property differently for different years, the County Board of Review's assessment was invalid and void. The ISBTC argued that the County Board of Review had this authority and that the ISBTC had the authority to issue a final determination with respect to all of the tax years in question. Under section 6-1.1-15-3(a) of the Indiana Code, a taxpayer could file a petition for review of a County Board of Review assessment with the ISBTC.⁴⁵⁷ However, when the taxpayer did so, the ISBTC was free to "assess the property in question, correcting any errors which may have been made."⁴⁵⁸ The court determined that the ISBTC may not cure a failure on the part of lower taxation authorities to comply with the statutory prerequisites to a valid assessment by way of its ability to correct any assessment error in taxpayer-initiated petitions. The court reasoned that the ISBTC's power under section 6-1.1-15-4 was limited to correcting errors in the assessment process itself and any other rule would allow the ISBTC to validate an otherwise invalid assessment and circumvent the statutory protections afforded taxpayers.⁴⁵⁹

Because the ISBTC made its final determination pursuant to section 6-1.1-15-4, the court examined whether the County Board of Review's assessment was valid. Joyce challenged the "jurisdiction" of the County Board of Review to assess different values for different years in between general assessments.⁴⁶⁰ The assessment of Joyce's property was properly before the County Board of Review. The County Boards of Review and the township assessors have the authority to reassess property at different values for the interim years between general assessments. The statutory prerequisites for the County Board of Review's ability to assess Joyce's property had been satisfied (i.e., Joyce filed a petition for review triggering the County Board of Review's ability to assess its property).⁴⁶¹ Therefore, the court held that the County Board of Review's assessment of Joyce's property was not invalid, and any error in the assessment was correctable by the ISBTC.⁴⁶²

Joyce next argued that the ISBTC may only assess its property for the three years prior to the ISBTC's final determination. The ISBTC argued that the three-year limitation applicable to its power to assess property *sua sponte* did not apply where the ISBTC assesses property in the course of taxpayer-initiated petitions. The court reasoned that when it is faced with a question of statutory interpretation, it first looks to the plain language of the statute.⁴⁶³ It recognized that where the language is unambiguous, the court has no power to construe the

457. *Id.* at 1191.

458. *Id.* (quoting IND. CODE ANN. § 6-1.1-15-4(a) (West 1996)).

459. *Id.* at 1192.

460. *Id.* (citing IND. CODE ANN. § 6-1.1-4-25, -30 (West Supp. 1996)).

461. *Id.* (citing IND. CODE ANN. § 6-1.1-15-2.1(b) (West Supp. 1996)).

462. *Id.*

463. *Id.*

statute for the purpose of limiting or extending its operation.⁴⁶⁴ The court found that by its own terms, section 6-1.1-9-4(a) did not apply to proceedings under section 6-1.1-15-4. On its face, section 6-1.1-9-4(a) was found not to apply to proceedings under section 6-1.1-14-10. However, it is made applicable by section 6-1.1-14-11. The general assembly in plain and unambiguous terms has limited the reach of this statute. The court refused to extend it. The ISBTC could properly assess Joyce's property as of March 1, 1989.⁴⁶⁵

Lastly, Joyce argued that it may withdraw its petition to the ISBTC as of right, thereby ending the case.⁴⁶⁶ According to Joyce, this right was grounded both in Indiana Trial Rule 41(A)⁴⁶⁷ and the common law procedural device known as the retraxit. The court looked to the Indiana Trial Rules and cases construing them for guidance in determining whether Joyce could withdraw its petition as of right.

The court observed that in hearings before the ISBTC, responsive pleadings are not required. This case therefore presented the issue of the operation of Rule 41(A) by analogy in a situation where no responsive pleading was required. According to Joyce, only a responsive pleading by the ISBTC would have foreclosed its right to withdraw its petition. In its memorandum, Joyce stated that "absent a counterpetition, a voluntary dismissal is available anytime prior to judgment" in a marriage dissolution proceeding.⁴⁶⁸ The court concluded after analyzing case law if the ISBTC can demonstrate either substantial expense or legal prejudice, Joyce's petition to withdraw was properly denied.⁴⁶⁹ At the time Joyce moved to withdraw its petition, the proceeding was in an advanced stage. Two evidentiary hearings had been held, and the hearing officer had decided on a recommendation (subject to Joyce's right to present further evidence).⁴⁷⁰

From a procedural standpoint, most of the work had been completed. To

464. *Id.* (citing *Cooper Indus., Inc. v. Department of State Revenue*, 673 N.E.2d 1209, 1211 (Ind. T.C. 1996)). Section 6-1.1-9-4(a) of the Indiana Code states, "Real property may be assessed, or its assessed value increased, for a prior year under this chapter only if the notice required by section 1 of this chapter is given within three (3) years after the assessment date for that prior year."

465. *Id.*

466. *Id.*

467. IND. TR. R. 41(A) provides:

(A) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff—By Stipulation. Subject to contrary provisions of these rules or of any statute, an action may be dismissed by the plaintiff without order of court:

(a) by filing a notice of dismissal at any time at any time before service by adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

468. *Joyce Sportswear*, 684 N.E.2d at 1193 n.5.

469. *Id.*

470. *Id.* at 1193 & n.7 (citing *Castello v. State Bd. of Tax Comm'rs*, 638 N.E.2d 1362, 1364 (Ind. T.C. 1994) (noting that a taxpayer has a right to present additional evidence where ISBTC raises new issues on petition to review)).

allow Joyce to withdraw would waste a substantial amount of time and effort. This constitutes a substantial expense. Therefore, a voluntary withdrawal as of right was inappropriate, and the ISBTC was well within its power to deny it. Taxpayers in Joyce's situation are on notice that a petition for review may ultimately result in an increase in assessment. It is a risk that taxpayers may weigh in decisions to petition the ISBTC for review.⁴⁷¹ The court concluded that in this particular case, to allow Joyce to withdraw its petition as of right would foreclose the ISBTC from ever reassessing Joyce's property for the tax years in question.⁴⁷² The original assessment date was well over three years ago. Therefore, the only avenue for the ISBTC to reassess Joyce's property is by way of Joyce's petition. Had the petition been dismissed, the ISBTC would have suffered legal prejudice, i.e., the inability to arrive at the correct assessment of Joyce's property for the tax years in question. As a result, Joyce was not entitled to withdraw its petition as of right.

Joyce also contended that a common law procedural device known as retraxit can be used in proceedings before the ISBTC and that the device allows a withdrawal of its petition as of right.⁴⁷³ The court ruled that, assuming that the retraxit may be used in proceedings before the ISBTC, it will examine whether the retraxit allows Joyce to withdraw its petition as of right.⁴⁷⁴ The ISBTC's ability to assess Joyce's property is a legal right conferred by statute and is triggered by Joyce's filing of a petition. The question, then, is whether Joyce could prejudice that right by the use of the retraxit. Because the retraxit is a kind of voluntary dismissal, the court looked to whether voluntary dismissals could prejudice the legal rights of the adverse party. In Indiana, one party's voluntary dismissal of the action did not carry with it the adversary's counterclaim without the adversary's consent.⁴⁷⁵ A counterclaim is a legal right analogous to the ISBTC's statutory right to assess the property in this case. Because the retraxit may not be used to prejudice counterclaims, the court concluded that it also may not be used to prejudice statutory rights triggered by the filing of a petition for review.⁴⁷⁶

Consequently, the court held that the retraxit, even if applicable to proceedings before the ISBTC, may not be used to prejudice the ISBTC's right to assess Joyce's property.⁴⁷⁷ At common law, the retraxit was a device by which the party using it renounced that party's rights concerning the action. It could not

471. *Id.* at 1194 (citing *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890, 894 n.4 (Ind. T.C. 1995); *Castello*, 638 N.E.2d at 1365; *Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 879 (Ind. T.C. 1993)).

472. *Id.*

473. *Id.* (citing *Ilagan v. McAbee*, 634 N.E.2d 827 (Ind. Ct. App. 1994)).

474. *Id.* at 1194-95.

475. *Id.* at 1195 (citing *Judd v. Gray*, 59 N.E. 849, 850-51 (1901); *Egolf v. Bryant*, 63 Ind. 365 (1878); *Nicodemus v. Simons*, 23 N.E. 521, 523 (1890) (retraxit by one plaintiff cannot result in prejudice to a co-plaintiff)).

476. *Id.*

477. *Id.*

be used, absent consent by the other party, to extinguish the vested rights of the other party. In this case, the court found that the ISBTC, due to Joyce's filing of its petition, had a vested right to assess Joyce's property thereby arriving at its view of the correct assessment for the tax years in question. To allow Joyce to unilaterally withdraw its petition would prejudice that right. The court concluded that ISBTC properly denied Joyce's motion.⁴⁷⁸

In *State Board of Tax Commissioners v. Two Market Square Associates Limited Partnership*,⁴⁷⁹ the initial petitioners in the Indiana Tax Court were Two Market Square Associates Limited Partnership, Duke Realty Investments, Inc., The Equitable Life Assurance Society of the United States, and W.R.C. Properties, Inc. all of whom owned parcels of land and improvements, including one or more parking lots on the land, in the Park 100 Industrial Complex located in Pike Township, Indiana.⁴⁸⁰ For both the 1989 and 1990 assessments of these properties, the Pike Township Assessor classified each entire parcel of land as primary commercial/industrial land and the petitioners challenged the assessments before the Marion County Board of Review by alleging that portions of the parcels should have been classified as undeveloped commercial/industrial land. The Marion County Board of Review refused to reclassify the portions of property from primary to undeveloped. Thereafter, each of the petitioners sought administrative review of the assessments before the ISBTC. After administrative hearings, each petitioner amended the administrative pleadings to assert that not only should portions of its property be reclassified as undeveloped, but also, that the paved parking areas should be reclassified from primary to secondary land as well. The ISBTC decided to reclassify the portions of the primary land as undeveloped, but determined that the petitioners' paved parking areas were properly assessed as primary commercial/industrial land. The petitioners then initiated original tax appeals challenging the valuation of their respective properties for the 1989 and 1990 assessment dates. The Indiana Tax Court consolidated the four appeals under one cause number and granted summary judgment in favor of the petitioners, stating that the issue before the Indiana Tax Court was whether the ISBTC erred in classifying the petitioners' paved parking areas as primary commercial/industrial land under title 50, section 2.1-4-2(f) of the Indiana Administrative Code.⁴⁸¹ With respect to this issue, the Indiana Tax Court determined that the administrative code required all commercial/industrial land used for parking to be classified as secondary, because of the wording of the ISBTC's regulations.⁴⁸² The Indiana Supreme Court granted a petition for review. In reviewing the case, the Indiana Supreme Court observed that the ISBTC was responsible to promulgate rules governing real property assessments

478. *Id.*

479. 679 N.E.2d 882 (Ind. 1997).

480. *Id.* at 883.

481. *Id.* at 884 (citing *Two Market Square v. State Bd. of Tax Comm'r's*, 656 N.E.2d 308, 309 (Ind. T.C. 1995)).

482. *Id.*

in the State of Indiana⁴⁸³ and that these rules explained to assessors and other interested persons how different types of property should be assessed. The Indiana Supreme Court also observed that a general reassessment, effective in 1979, required the reassessment of all real property in Indiana and that a comprehensive set of ISBTC regulations contained in title 50, sections 2-1-1 to 2-13-5⁴⁸⁴ governed all real property assessments between the 1979 general reassessment and the 1989 general reassessment. The Indiana Supreme Court stated title 50, section 2-2-6 of the Indiana Administrative Code guided assessors in assigning a land "type" code to a particular parcel of land between the 1979 and 1989 reassessments.⁴⁸⁵

The 1989 and 1990 assessments were governed by a revised set of rules.⁴⁸⁶

483. *Id.* (citing IND. CODE §§ 6-1.1-31-1 to -9 (1993)).

484. *Id.* (citing IND. ADMIN. CODE tit. 50, rr. 2-1-1 to 2-13-5 (1979 ed., repealed 1989)).

485. It was promulgated as follows:

TYPE refers to a one digit code denoting the classification of the parcel, or portion thereof, according to its use.

In entering acreage or square footage, the following type codes apply:

Enter 1 PRIMARY IND/COMM SITE to indicate that portion of the land utilized as the primary building site or plant site, *including primary parking and yard storage*.

Enter 2 SECONDARY IND/COMM SITE to indicate that portion of the land utilized for uses which are "secondary" to the primary use and, therefore, require individual treatment. Use Subcodes . . .

(21) to indicate that the secondary use is parking; generally applicable to industrial operations.

(22) to indicate that the secondary use is yard storage, referring to that portion of the land predominantly utilized for material and/or product storage; generally applicable to industrial operations.

(23) to indicate the secondary use as a dump area, referring to that portion of the land predominantly utilized for refuse; generally applicable to industrial operations.

Enter 3 UNDEVELOPED to indicate that portion of land which is unused but which is capable of being used.

Id. at 884-85 (quoting IND. ADMIN. CODE tit. 50, r 2-2-6 (1979) (emphasis added)).

486. The regulation contained in IND. ADMIN. CODE tit. 50, r 2-2-6 ("1989 version") was updated and promulgated as follows:

"LAND TYPE" refers to a code that denotes the classification of all or part of the parcel according to its use.

The following codes apply to the entry of acreage or square footage:

In April of 1989 the State Board issued Reassessment Bulletin RO-33 ("RO-33") which provided in part:

The State Board of Tax Commissioners has defined that the primary building or plant site would be land utilized as follows:

- 1) The portion of land located under the buildings.
- 2) *The portion of the land used for primary parking areas.*
- 3) The portion of land used as roadways.
- 4) The portion of land used as primary yard storage.⁴⁸⁷

The Indiana Supreme Court observed that a comparison of the 1979 version with the 1989 version revealed that the 1989 version did not include the specific language indicating that primary site "includ[es] primary parking and yard storage."⁴⁸⁸ However, RO-33 clarified that ambiguity. Therefore, the Indiana Supreme Court concluded that the issue before the Indiana Supreme Court was whether, under title 50, section 2-1-4-2 of the Indiana Administrative Code, paved parking areas could be assessed in 1989 and 1990 as secondary only (as the Indiana Tax Court had concluded) or as either primary or secondary (as the ISBTC contended).⁴⁸⁹

In examining the applicable regulations, the Indiana Supreme Court determined that there was nothing in the administrative code which required that parking be classified only as secondary.⁴⁹⁰ The court observed that the ISBTC promulgated the section of the administrative code and interpreted the regulation to permit land used for parking to be treated as primary or secondary depending

Enter "1" to indicate "PRIMARY IND/COMM SITE" which is the portion of the land utilized as the primary building site or plant site.

Enter "2" to indicate "SECONDARY IND/COMM SITE," which is the portion of the land utilized for uses which are secondary to the primary use and, therefore, require individual treatment. Use the following subcodes, which generally apply to industrial operations:

"21" to indicate that the secondary use is parking

"22" to indicate that the secondary use is yard storage, referring to that portion of the land predominantly utilized for material or product storage

"23" to indicate the secondary use as a dump area, referring to that portion of the land predominantly utilized for refuse

Enter "3" to indicate "UNDEVELOPED", which is the portion of land that is usable but is unused.

Two Market Square, 679 N.E.2d at 885.

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.* at 886.

upon its use. Further, the ISBTC's interpretation of the administrative code section was evidenced by the following: (1) ISBTC's promulgation of Reassessment Bulletin RO- 33 explaining that "primary building site," included the portions of land used for parking; (2) during the 1989 and 1990 assessments, the ISBTC approved the classification of parking areas as primary commercial land in the appropriate cases; and, (3) the 1992 version of the assessment rules included "regularly used parking areas" as an example of primary commercial or industrial land.⁴⁹¹ Thus, the Indiana Supreme Court concluded that the ISBTC's interpretation of the administrative code was not inconsistent with the regulation itself, and in an attempt to give the words and phrases of the regulation their plain and ordinary meaning, the Indiana Supreme Court construed the statute to permit the classification of parking land as either primary or secondary.⁴⁹² The Indiana Supreme Court also construed the relevant provision of the regulation as an explanation to local assessment officials that they should enter subcode 21 on the property record card when the secondary commercial use is parking.⁴⁹³ Finally, the Indiana Supreme Court ordered that summary judgment be entered in favor of the State Board of Tax Commissioners.⁴⁹⁴

491. *Id.* (citing IND. ADMIN. CODE tit. 50, r 2.2-4-1(18) (1992)).

492. *Id.*

493. *Id.*

494. *Id.* at 886-87.

RECENT DEVELOPMENTS IN INDIANA TORT LAW

TAMMY J. MEYER*
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INTRODUCTION

This survey Article covers the ever-changing developments in tort law in Indiana from October 1996 to October 1997. Judicial decisions have clarified existing law, recognized several new causes of action, and expanded and restricted tort law in the state of Indiana.

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I. INTENTIONAL TORTS

A. False Imprisonment

Haltom v. Bruner & Meis, Inc.,¹ clarified the standard to be applied for determining probable cause under Indiana's Shoplifting Detention Statute.² Haltom, a suspected shoplifter, brought an action against the defendant's store for, among other torts, false arrest and imprisonment. A customer purchased merchandise from the store and then misplaced his package. The customer reported his package stolen to the store. The following day, Haltom presented the package to the store and requested a refund. Store employees identified the merchandise as that which had been reported stolen and detained Haltom until police arrived. He was arrested and taken into custody. Charges were filed against him but were ultimately dismissed.³

The jury was instructed as to the language of the Shoplifting Detention Statute and that if the defendant acted in compliance and with probable cause, then such was a complete defense to Haltom's claims for false arrest and imprisonment. The jury returned a verdict for the store and Haltom appealed.⁴ Haltom argued that the store lacked probable cause to believe that he stole the merchandise and that the jury was improperly instructed on the applicability of the statute because the property he attempted to return was not "unpurchased merchandise taken from the store. . . ."⁵

The court of appeals affirmed the jury verdict in favor of the store,⁶ holding that the statute did not require that the merchandise be that of the merchant. Rather, a detention can occur when the store has probable cause to believe that any theft has occurred.⁷ Once the store has made the decision to detain, it has certain enumerated powers which it "may" exercise, including determining whether the suspect has unpurchased merchandise taken from the store.⁸ The

1. 680 N.E.2d 6 (Ind. Ct. App. 1997).

2. IND. CODE § 35-33-6-1 to -5 (1993).

3. *Haltom*, 680 N.E.2d at 8.

4. *Id.*

5. *Id.* Section 35-33-6-2 provides in relevant part:

(a) An owner or agent of a store who has probable cause to believe that a theft has occurred or is occurring on or about the store and who has probable cause to believe that a specific person has committed or is committing the theft may:

(1) detain the person...

....

(3) determine whether the person has in his possession unpurchased merchandise taken from the store

IND. CODE § 35-33-6-2 (1993).

6. *Haltom*, 680 N.E.2d at 9.

7. *Id.*

8. *Id.*

court went on to conclude that the store acted properly because it had probable cause to detain Haltom, noting that probable cause under the Shoplifting Detention Statute must meet the same requirements as probable cause for a police officer.⁹

B. Abuse of Process

The Indiana Court of Appeals in *Reichhart v. City of New Haven*,¹⁰ addressed whether the existence of ulterior motive alone would sustain an action for abuse of process. The court concluded that the prevailing view in Indiana, and that which the court adopted, is that an abuse of process claim requires proof of two elements—improper process and improper motive.¹¹ The court noted that the first inquiry is whether the defendant employed improper “process.”¹² It is not until *after* that issue has been resolved unfavorably to the defendant that further inquiry into the defendant’s motives is to be made.¹³ Thus, the court concluded that because the defendant’s actions were procedurally and substantively proper (i.e., no improper process), the defendant’s motives were irrelevant.¹⁴

C. Intentional Trespass

The intent necessary for intentional trespass was clarified in *Martin v. Amoco Oil Co.*¹⁵ Noting that Indiana case law did not do much to clarify what intent was necessary for intentional trespass, the court looked to a 1985 Washington Supreme Court decision which defined the requisite intent.¹⁶ In *Bradley v. American Smelting & Refining Co.*,¹⁷ the court found that “intent” meant that the

actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it . . . , [i]ntent is not, however limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.¹⁸

Martin adopted the definition of intent espoused in *Bradley*.¹⁹ The court in *Martin* found that the defendant’s intent to refine oil was insufficient to support

9. *Id.*

10. 674 N.E.2d 27 (Ind. Ct. App. 1996).

11. *Id.* at 30.

12. *Id.* The court also clarified what was meant by the term, “process,” holding that the definition is expansive and includes actions undertaken in pursuing a legal claim. *Id.*

13. *Id.*

14. *Id.* at 31.

15. 679 N.E.2d 139 (Ind. Ct. App. 1997).

16. *Id.* at 147.

17. 709 P.2d 782 (Wash. 1985).

18. *Id.* at 785 (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

19. *Martin*, 679 N.E.2d at 147.

a claim of intentional trespass when oil migrated underground to the plaintiffs' property.²⁰ Rather, the court found that the defendant must have intentionally committed an act that it knew or was substantially certain would result in the migration of oil onto the plaintiffs' property to fulfill the intent element of intentional trespass.²¹

D. Defamation

1. Actual Malice.—In *Journal-Gazette Co. v. Bandido's, Inc.*,²² the Indiana Court of Appeals addressed what provides a sufficient basis for finding actual malice in a defamation case involving public officials and figures. In *Bandido's*, the operator of a restaurant brought a defamation suit against a newspaper based on a headline for an article which described the closing of the restaurant by the health board. After the first inspection, the health board noted numerous violations including the presence of flies, roaches and rodents. On a second inspection, there was no evidence of insects or rodents but several health code violations had not been remedied. The restaurant was subsequently closed. The newspaper obtained the inspection reports and ran a front page story concerning the problems. The headline read "Health board shuts doors of Bandido's—Investigators find rats, bugs at northside eatery."²³

The controversy concerned the word "rats." The word had been included in the headline by a copy editor who thought that the word "rodents" in the health board's report suggested "rats." The word "rats" did not appear in the article. The newspaper's policy, however, was that words appearing in the headline should be included in the article. In fact, the copy editor who wrote the headline had previously received poor evaluations for inaccurate headlines. Experts at trial agreed that the headline was inappropriate.²⁴ The jury returned a verdict in favor of the restaurant for \$985,000 and the newspaper appealed.²⁵

The only issue addressed by the court of appeals was whether the evidence was sufficient to demonstrate clear and convincing evidence that the newspaper published the headline with actual malice. The court of appeals found the evidence insufficient.²⁶

The court noted that "[a] defamatory falsehood is made with 'actual malice' when it is published 'with knowledge that it was false or with reckless disregard

20. *Id.*

21. *Id.*

22. 672 N.E.2d 969 (Ind. Ct. App. 1996).

23. *Id.* at 971.

24. *Id.*

25. *Id.* at 972.

26. *Id.* at 975. Interestingly, the case had previously been before the court of appeals after the trial court granted summary judgment in favor of the newspaper. At that time, the court found that there remained a factual dispute on the issue of actual malice. It appears that, after having heard the plaintiff's evidence, the trial court should have granted judgment on the evidence in favor of the defendant.

of whether it was false or not.”²⁷ To prove reckless disregard, there must be evidence that the defendant had serious doubt as to the truth of the publication.²⁸ However, “[e]vidence of an extreme departure from professional journalistic standards, without more, cannot provide a sufficient basis for finding actual malice.”²⁹

The court concluded that even though the newspaper may have been extremely careless, there was not sufficient clear and convincing evidence that the newspaper had knowledge that the headline was false or that the newspaper had serious doubts as to the truth of the headline.³⁰ Although the court noted that the evidence may demonstrate an extreme departure from professional standards, that was not sufficient to establish actual malice; extremely careless errors do not constitute actual malice.³¹

2. *Defamation Per Se and Per Quod*.—Although not deciding any issues of first impression, the district court in *Moore v. University of Notre Dame*,³² provided a good discussion of Indiana law on the issues of defamation per se and per quod and what damages must be proven.³³

II. PARENTS' LIABILITY FOR ACTS OF CHILD

In *Shepard v. Porter*,³⁴ the court again emphasized that under Indiana law, in order for a parent to be liable for negligent supervision, the parent must know or should know of the child's propensity to engage in *the particular act or course of conduct* leading to the plaintiff's injury.³⁵ Knowledge of a child's *general disposition* alone is insufficient.³⁶ In *Porter*, knowledge by the parents that their boys had mischievous, reckless, heedless or vicious and malicious dispositions and reputations was insufficient to support a claim for negligent supervision.³⁷ The act in which the children engaged was setting fires, but there was no evidence that the parents were aware of their children having such a propensity.³⁸

27. *Id.* at 972 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

28. *Id.*

29. *Id.* (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989)).

30. *Id.* at 975.

31. *Id.*

32. 968 F. Supp. 1330 (N.D. Ind. 1997).

33. See also *Owens v. Schoenberger*, 681 N.E.2d 760 (Ind. Ct. App. 1997).

34. 679 N.E.2d 1383 (Ind. Ct. App. 1997).

35. *Id.* at 1389 (citing *Wells v. Hickman*, 675 N.E.2d 172, 178 (Ind. Ct. App. 1995)) (emphasis added).

36. *Id.* (emphasis added).

37. *Id.* at 1390.

38. *Id.* at 1389-90.

III. WRONGFUL DEATH

In *Wolf v. Boren*,³⁹ the court briefly addressed the issue of dependency of a parent and adult siblings upon a deceased adult child under Indiana's Wrongful Death Statute.⁴⁰ On November 23, 1993, the day of his birthday and just shortly before Thanksgiving, a well-known and respected Indianapolis lawyer, Robert Wolf, was killed in an automobile accident by William Boren, a drunk driver. Robert had no children and had never been married. He shared with his family (his parents and siblings) the fruits of his many years of hard work as an outstanding trial lawyer—a beautiful vacation home on Lake Monroe. After his untimely and tragic death, his family brought a wrongful death suit against Boren seeking funeral and burial and legal expenses.⁴¹ His family also claimed that they were unable to financially maintain the vacation home without the support of Robert.⁴²

Boren claimed that Robert's parents and siblings were not dependent next of kin under Indiana's Wrongful Death Statute and the trial court agreed.⁴³ The court of appeals affirmed the trial court's ruling.⁴⁴ The court of appeals found that although Robert's family was dependent upon him to provide his vacation home as a family retreat, mere gifts, donations or acts of generosity alone are not sufficient to establish dependency on the part of the recipient.⁴⁵ Apparently the court concluded that because the vacation home was not "needed" by the family and therefore was not a "necessity," their action must fail.⁴⁶ Taken one step further, had Robert not been so fortunate to have such a lovely vacation home which he graciously chose to share, but instead found other ways to assist his family, such as providing for other needs, the conclusion may have been different.⁴⁷

IV. LIABILITY OF RELIGIOUS ORGANIZATIONS

The Indiana Court of Appeals in *Konkle v. Henson*⁴⁸ addressed several significant issues relating to religious organizations. In *Konkle*, the victim of sexual molestation brought suit against her minister, church and church associations. The plaintiff had been sexually molested by her minister since she was seven. She began experiencing emotional problems and entered counseling

39. 685 N.E.2d 86 (Ind. Ct. App. 1997).

40. *Id.* at 87.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 88.

45. *Id.* at 87.

46. *Id.*

47. The author wishes to dedicate this survey article to Robert Wolf and his family. Robert was an outstanding trial lawyer and a dear friend whose generosity was remarkable. He was taken from us too soon and is very much missed.

48. 672 N.E.2d 450 (Ind. Ct. App. 1996).

which continued for seven or eight years. However, the plaintiff never told her counselor about the molestation and when the plaintiff was fifteen or sixteen, she realized that her minister's behavior was wrong. A year later she realized that she could control some of the minister's behavior and his touchings thereafter were limited. When the plaintiff was seventeen or eighteen, she and her mother discussed the possibility of filing criminal charges but decided against it. The last touching occurred late 1990 when the plaintiff was twenty. The plaintiff filed her complaint in 1992 (four years after she reached majority but less than two years after the final touching). The plaintiff alleged claims of negligent hiring, supervision, retention and respondent superior liability.⁴⁹

The defendants filed motions for summary judgment. The trial court held that the First Amendment barred judicial intervention in ecclesiastical affairs and granted defendant's motion. However, recognizing that the issue of intervention was an issue of first impression in Indiana, the trial court also ruled on additional grounds for summary judgment which might be relevant if the appellate court ruled that judicial intervention was proper. The trial court addressed four additional issues. First, the court granted summary judgment to defendants based on respondeat superior because the minister's acts were outside the scope of his employment. Second, summary judgment was denied as to the local church on the issue of claims by a member of an unincorporated association. Third, summary judgment was denied to the defendants as to the issues of negligence. And fourth, the court found that the statute of limitations barred recovery against defendants except for acts committed after August 1990.⁵⁰ The trial court granted summary judgment for the defendants and the plaintiff appealed.⁵¹

The Indiana Court of Appeals held that the First Amendment did not bar the plaintiff's claims.⁵² However, the court also held that the minister was not acting within the scope of his employment, thus barring the plaintiff's claim under the respondent superior doctrine.⁵³ The court went on to rule that the limitations period began to run each time the minister touched the plaintiff, thereby barring part of her claims.⁵⁴ The court also held that the question of whether the plaintiff was a member of the church was a question of fact precluding summary judgment.⁵⁵ Finally, the court held that the plaintiff failed to establish that the associations knew about the minister's misconduct, thus precluding her negligent hiring and retention claims.⁵⁶

The first issue (of first impression) addressed by the Indiana Court of Appeals was whether the First Amendment precluded review of the church's activities. Noting that while the freedom to believe is absolute, the court

49. *Id.* at 453. The plaintiff's claims against the minister were not part of the appeal.

50. *Id.*

51. *Id.* at 454.

52. *Id.* at 456.

53. *Id.* at 457.

54. *Id.* at 459.

55. *Id.*

56. *Id.* at 461.

emphasized that the freedom to act is subject to regulation.⁵⁷ Excessive entanglement occurs when courts begin to review and interpret a church's constitution, laws and regulations.⁵⁸ Therefore, the court reviewed each of the plaintiff's claims in light of the First Amendment.

As to the plaintiff's claim for negligent hiring and retention, the court noted that the test is whether the employer exercised reasonable care.⁵⁹ The issue facing the court was whether or not the First Amendment precluded review of the church's operational activities when they endanger public safety. Noting that courts in other jurisdictions are divided on the issue, the court found that in the present case, the plaintiff's claims did not require any inquiry into religious doctrine or practice.⁶⁰ The court was simply applying secular standards to secular conduct.⁶¹ The court found that the same was true with respect to the plaintiff's claim for respondeat superior,⁶² as all the court was required to do was apply traditional tort law to the plaintiff's claims. Thus, the court of appeals found that the trial court erred in ruling that the First Amendment precluded the plaintiff's claims.⁶³

The court went on to address the substance of the plaintiff's claims, the first of which was the plaintiff's claim of respondeat superior liability. After reviewing Indiana law on the issue, the court found that the minister's acts of molestation were not authorized by the church.⁶⁴ The fact that they took place in the church was not enough to create liability, nor was the minister engaging in authorized acts or serving the interests of his employer at the time of the molestation. Therefore, the court held that summary judgment was proper because the minister was not acting within the scope and course of his employment.⁶⁵

The only remaining claims of the plaintiff were claims for negligent hiring, supervision and retention. The court first addressed whether the plaintiff's claims were barred by the applicable two year statute of limitations. The issue was the starting of the statute of limitations. The plaintiff argued that a continuing wrong took place and the statute did not begin to run until the final act occurred. The defendants argued that each act was a separate tort invoking the statute of limitations for each occurrence.⁶⁶

57. *Id.* at 454.

58. *Id.*

59. *Id.* at 455.

60. *Id.*

61. *Id.* at 455-56.

62. *Id.* at 456.

63. *Id.*

64. *Id.* at 457.

65. *Id.* Although the court noted that an employer can be vicariously liable for the criminal acts of its employees, given the cases cited by the court and the decision in *Konkle*, it is hard to imagine the court applying the doctrine of respondeat superior in such cases, as the courts seem to find every opportunity to refrain from doing so. *Id.*

66. The plaintiff was under 18 when many of the acts occurred so she had two years from

The court rejected the plaintiff's argument, finding that the plaintiff knew the molestation was occurring and that it was wrong when she was fifteen or sixteen. She had "discovered" the tort and the statute of limitations began to run. Thus, the court found that all claims relating to acts prior to two years after the plaintiff reached majority were barred by the statute of limitation.⁶⁷ At this point, the plaintiff's only remaining claims were for negligent hiring, supervision and retention with respect to acts occurring after October 2, 1990.

The court next addressed whether the plaintiff's remaining claims were barred, as she was alleged to be a member of the unincorporated association which she was suing. Noting that the court was only concerned with the plaintiff's membership status after October 2, 1990, the court found that questions of fact remained as to whether the plaintiff was a member at that time and precluded summary judgment.⁶⁸

Finally, the court ruled against the plaintiff as to her claims for negligent hiring, supervision and retention against the International Church because there was no evidence to support the plaintiff's claims.⁶⁹ However, questions of fact remained as to whether the local and district churches had knowledge, or should have had knowledge, of the minister's actions.

Konkle provides guidance on how the court of appeals intends to resolve the ever increasing number of sexual abuse cases against religious organizations. The court of appeals does not consider molestation acts as continuing, or acts of this nature by a minister to be within the scope of employment. Moreover, if the plaintiff is a member of the church at the time, the plaintiff is without remedy. However, the court implied that the time may be appropriate to reverse the *Calvary Baptist* rule precluding members of unincorporated associations from suing their associations for intentional torts.

V. PROFESSIONAL NEGLIGENCE

During the survey period the court of appeals addressed several significant issues relating to professional negligence claims against healthcare providers.

A. *Constitutionality of Indiana's Medical Malpractice Statute of Limitations*

In *Martin v. Richey, Jr.*,⁷⁰ the court of appeals held that Indiana's occurrence based medical malpractice statute of limitations violates the equal privileges and immunities clauses of the State Constitution and the open courts provision.⁷¹

age 18 to bring her claims (unless there was a continuing wrong). However, the plaintiff did not bring suit until four years after she turned 18.

67. *Konkle*, 672 N.E.2d at 459.

68. The court noted that the *Calvary Baptist* rule precluding members of unincorporated associations from suing the association was harsh, particularly for intentional torts. *Id.* at 459. However, the court stated that intentional torts were not before the court. *Id.* at 460 n.13.

69. *Id.* at 460.

70. 674 N.E.2d 1015 (Ind. Ct. App. 1997).

71. *Id.* at 1029.

After a critical analysis of Indiana's medical malpractice statute of limitations,⁷² the privileges and immunities clause of the Indiana Constitution,⁷³ and the open courts provision of the Indiana Constitution,⁷⁴ the court, in one of the most followed tort cases of the year, found that the occurrence based statute was unconstitutional.⁷⁵

In analyzing the equal privileges argument, the court found that medical malpractice victims were treated differently from other tort victims because the former were governed by an occurrence based statute of limitations while the later were governed by a discovery based statute of limitations.⁷⁶ The court then applied the two part *Collins* test which examines whether: (1) the disparate treatment is reasonably related to inherent characteristics which distinguish the unequally treated classes and (2) whether the preferential treatment is uniformly applicable and equally available to all persons similarly situated.⁷⁷ The court found that the first prong was met because the disparate treatment was justified by reasonable basis for the classification; the classification is reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs. Thus, the disparate treatment was not unreasonable under the first prong.⁷⁸ However, the second prong of the *Collins* test was not met because the plaintiffs claiming medical negligence, whose statute of limitations expired before they were aware of the malpractice, are treated unequally.⁷⁹ The court also found that the statute violated the open court's provision of the Indiana Constitution. Choosing not to "sleepwalk through the law,"⁸⁰ and sidestepping the doctrine of stare decisis, the court found the statute unconstitutional.⁸¹

The court of appeals followed *Martin*, in a brief opinion, *Harris v. Raymond*.⁸² However, a month later, and just seven months after the *Martin* decision, an opposite conclusion was reached by the court in *Johnson v. Gupta*.⁸³

72. IND. CODE § 27-12-7-1(b) (1993).

73. IND. CONST. art. I, § 23.

74. *Id.* § 11.

75. *Martin*, 674 N.E.2d at 1029.

76. *Id.* at 1022.

77. *Id.* at 1019-21 (citing *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)).

78. *Id.*

79. *Id.* at 1022-23.

80. *Id.* at 1025 (quoting *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 364 (1990)).

81. *Id.* at 1027.

82. 680 N.E.2d 551 (Ind. Ct. App. 1997).

83. 682 N.E.2d 827 (Ind. Ct. App. 1997).

After *Martin*, *Harris*, and *Johnson* the following scoreboard existed:

<u>Holding Indiana's Medical Malpractice Statute of Limitations Unconstitutional</u>	<u>Holdings Indiana's Medical Malpractice Statute of Limitations Constitutional</u>
Judge Riley ⁸⁴	Judge Darden ⁸⁵
Judge Chezem ⁸⁶	Judge Staton ⁸⁷
Judge Barteau ⁸⁸	Judge Garrard ⁸⁹
Judge Friedlander ⁹⁰	
Judge Rucker ⁹¹	

The split in decisions by the court of appeals (although not equally by the judges) leaves Indiana law uncertain on this issue. However, the issue is presently pending before the Indiana Supreme Court.

B. Wrongful Birth

In *Bader v. Johnson*,⁹² the Indiana Court of Appeals addressed for the first time a claim for wrongful birth. The plaintiff gave birth to a child with congenital hydrocephalus and severe mental and motor retardation. The child died four months later. Prior to becoming pregnant, the plaintiff had sought genetic counseling from Dr. Bader because her first child had congenital disabilities, although testing had shown the pregnancy was normal. During genetic counseling with Dr. Bader, the plaintiff conceived and an amniocentesis at 19½ weeks revealed no abnormalities. An ultrasound, however, showed the baby to be larger than expected with an unusually shaped head. Although Dr. Bader requested follow up testing, due to an office error, the plaintiff was not examined and the initial ultrasound was not forwarded to the plaintiffs' treating physician. The treating physician's ultrasound at thirty-three weeks showed hydrocephalus and it was too late then to terminate the pregnancy. The baby was born, but died shortly thereafter. If the plaintiff had been made aware of the problems in time, she would have terminated the pregnancy.

The plaintiff brought suit for wrongful birth seeking damages for (1) lost opportunity to terminate the pregnancy and having to proceed through labor and delivery, (2) emotional pain of knowing that the baby suffered the defects and had little chance to survive, (3) care and treatment for the child, (4) medical expenses, (5) lost personal time and income, and (6) emotional pain of watching

84. Author of *Martin*.

85. Dissent in *Martin*.

86. Concurred in *Martin*.

87. Author of *Johnson*.

88. Author in *Harris* and concurred in *Johnson*.

89. Concurred in *Johnson*.

90. Concurred in *Harris*.

91. Concurred in *Harris*.

92. 675 N.E.2d 1119 (Ind. Ct. App. 1997).

their baby suffer and die.⁹³ Dr. Bader moved for summary judgment arguing that Indiana does not recognize a claim for wrongful birth.⁹⁴ The trial court denied the motion.⁹⁵ The court of appeals affirmed, recognizing for the first time in Indiana a claim for damages for wrongful birth.⁹⁶

The court began its analysis by defining “wrongful birth” as “claims brought by parents of a child born with birth defects alleging that due to negligent medical advice or testing they were precluded from an informed decision about whether to conceive a potentially handicapped child, or, in the event of a pregnancy, to terminate it.”⁹⁷ If the plaintiff seeks damages on behalf of the child, it is one for “wrongful life,” which Indiana has rejected.⁹⁸ A third theory, “wrongful conception or pregnancy,” the court noted, referred to a claim for damages sustained by parents of an unexpected child alleging that conception resulted from negligent sterilization procedures or a defective contraceptive product.⁹⁹ Indiana recognizes this type of claim.¹⁰⁰

The court then looked to other jurisdictions for guidance, noting that thirty-one states and the District of Columbia have addressed the issue. Twenty-two states and the District of Columbia have recognized the claim by judicial decision,¹⁰¹ two states have recognized the claim which was subsequently barred by statute,¹⁰² and two have barred the claim by judicial decision.¹⁰³ Thus, a majority of courts have recognized the claim. The Indiana Court of Appeals followed suit.

In recognizing a claim for wrongful birth, the court distinguished claims for wrongful life which Indiana has continued to reject.¹⁰⁴ The court noted that in a wrongful life claim, the tort system must put a value on a life with defects as opposed to no life at all.¹⁰⁵ However, in a wrongful birth claim, the injury is to the parents and the damages flowing from that injury are incurred by them, not the child; such damages include emotional, physical and financial harm. The judges, however, could not agree upon whether or not emotional damages were recoverable by the parents—that issue, it appears, may need to be resolved by the Indiana Supreme Court.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1127.

97. *Id.* at 1122.

98. *Id.* (citing *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 633 (Ind. 1991)).

99. *Id.*

100. *Id.* (citing *Garrison v. Foy*, 486 N.E.2d 5 (Ind. Ct. App. 1985)).

101. *Id.*

102. *Id.* at 1123.

103. *Id.*

104. *Id.*

105. *Id.*

C. Compensability of Damages

In *Rimert v. Mortell*,¹⁰⁶ the court of appeals was called upon to determine (1) whether Indiana Code section 27-12-15-3(5) of Indiana's Medical Malpractice Act precludes Indiana's Patient's Compensation Fund (PCF) from inquiring into the extent of liability of a health care provider after the health care provider has settled; (2) whether a plaintiff who has been imprisoned for life upon a criminal conviction may recover from a tortfeasor damages for "loss of enjoyment of life" associated with his imprisonment; (3) whether legal fees incurred to defend a plaintiff's underlying criminal charges are compensable damages under Indiana law; and, (4) whether a plaintiff can recover damages from a tortfeasor for emotional distress that the plaintiff allegedly suffered from imprisonment.¹⁰⁷

In June of 1990, Gary Rimert was diagnosed as psychotic by Dr. Judy Anderson. On June 14, 1990, he was examined by Dr. Desai and later that day admitted into Lafayette Home Hospital where he was treated by Dr. Desai for nearly a month. Dr. Desai released Gary into the custody of his parents on July 11, 1990.

On July 13, 1990, Elizabeth Rimert, Gary's mother, allowed Gary to use the family car under the condition that he take his prescribed medication and return home for dinner. Instead of returning home, Gary left Indiana, enroute to his grandparents' home in South Carolina. Gary arrived in South Carolina the next morning and several hours after his arrival, he bludgeoned to death his grandparents and two of their neighbors with a kitchen knife. Gary was subsequently charged with four counts of murder, found guilty but mentally ill on all counts, and sentenced to life imprisonment.¹⁰⁸

Betty Rimert, as conservator of Gary Rimert, filed a proposed complaint for malpractice with the Indiana Department of Insurance against Dr. Desai, claiming that he was negligent in discharging Gary from the hospital and that his negligence was the proximate cause of the four murders and Gary's subsequent imprisonment. Dr. Desai's insurance carrier settled Betty's claim for \$100,000, the maximum recovery permitted under the Act.¹⁰⁹ Next, Betty petitioned the PCF for excess damages, seeking recovery for Gary's loss of enjoyment of life due to his imprisonment, for his legal defense fees, and for his emotional distress.¹¹⁰ Following a bench trial, the court denied Betty's petition and held that the damages sought were not compensable under Indiana law.¹¹¹ The court also held that Dr. Desai's release of Gary was not the proximate cause of the murders or of Gary's imprisonment.¹¹² Betty appealed the trial court's decision.

The court of appeals first addressed Betty's argument that the trial court

106. 680 N.E.2d 867 (Ind. Ct. App. 1997).

107. *Id.* at 869.

108. *Id.*

109. *Id.*

110. *Id.* at 870.

111. *Id.*

112. *Id.*

erred by revisiting liability. In support of her argument, Betty cited section 27-12-15-3 of the Indiana Code.¹¹³

The commissioner argued that settlement of liability is merely an admission of a negligent act and not an admission of proximate causation of all damages alleged.¹¹⁴ The commissioner further argued that under Betty's scheme, health care providers and their insurance carriers could bind the PCF to the payment of damages by deciding to settle.¹¹⁵ Thus, the PCF would be obligated to pay excess damages in cases involving damages that should not have been awarding in the first place.¹¹⁶

The court of appeals noted that the commissioner's position was appealing,

113. Section 27-12-15-3 provides in pertinent part:

If a health care provider or its insurer has agreed to *settle its liability on a claim* by payment of its policy limits of one hundred thousand dollars (\$100,000), and the claimant is demanding an amount in excess of that amount, the following procedure must be followed:

- (1) A petition shall be filed by the claimant . . . :
- (B) Demanding payment of damages from the patient's compensation fund.
-
- (4) The judge of the court in which the petition is filed shall set the petition for approval or, if objections have been filed, for hearing, as soon as practicable
- (5) . . . If the commissioner, the health care provider, the insurer of the health care provider, and the claimant cannot agree on the amount, if any, to be paid out of the patient's compensation fund, the court shall, after hearing any relevant evidence on the issue of claimant's damage submitted by any of the parties described in this section, determine the amount of claimant's damages, if any, in excess of the one hundred thousand dollars (\$100,000) already paid by the insurer of the health care provider. The court shall determine the amount for which the fund is liable and make a finding and judgment accordingly. *In approving a settlement or determining the amount, if any, to be paid from the patient's compensation fund, the court shall consider the liability of the health care provider as admitted and established.*

IND. CODE § 27-12-15-3 (1993) (emphasis added).

114. *Rimert*, 680 N.E.2d at 870-71.

115. *Id.* at 871. The commissioner argued that the health care providers and insurance carriers' decisions to settle are often unrelated to the strength of the plaintiff's case.

116. *Id.*

however, the issue had previously been decided against the commissioner in *Dillon v. Glover*.¹¹⁷ In *Glover*, the court held that once the provider's liability upon the claim has been settled, the statute prohibits litigation of a health provider's liability.¹¹⁸ Thus, the issue of proximate causation is foreclosed.

The appellate court held that although the trial court erroneously determined that Dr. Desai did not proximately cause the damages sought by Betty, its dispositive holding was that the damages Betty sought to recover were non-compensable.¹¹⁹ The court concluded that such a determination is within the authority of the trial court and the trial court may, in a case such as this, inquire into the compensable nature of injuries.¹²⁰

Next, the court addressed whether the trial court was correct in determining that the damages requested by Betty were not compensable under Indiana law.¹²¹ The court stated that it is general public policy that "a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party . . . [or] . . . on a violation by himself of the criminal or penal laws. . . ."¹²² The court reasoned that this prohibition against actions based in whole or in part upon one's own criminal conduct is grounded upon the sound public policy that convicted criminals should not be permitted to impose or shift liability for the consequences of their own anti-social conduct.¹²³ The court acknowledged that Indiana has not expressly adopted this public policy, but went on to state that it is consistent with the public policy expressed by the Indiana legislature and existing case law.¹²⁴ Thus, the court held it to be the public policy of Indiana that an individual who has been convicted of a crime should be precluded from imposing liability upon others, through a civil action, for the results of his or her own criminal conduct.¹²⁵ "Consequently, a person may not maintain an action if, in order to establish the cause of action, he or she must rely, in whole or in part, upon an illegal act or transaction to which he or she is a party or upon a violation by him or herself of the criminal laws."¹²⁶

117. 597 N.E.2d 971 (Ind. Ct. App. 1992).

118. *Id.* at 973.

119. *Rimert*, 680 N.E.2d at 871.

120. *Id.* (citing *J.L. v. Mortell*, 633 N.E.2d 300 (Ind. Ct. App. 1994)).

121. The court noted that "upon judicial review, a trial court's judgment may be affirmed upon grounds different from those reflected in the trial court's decision." *Id.*; see *Kimberlin v. DeLong*, 637 N.E.2d 121 (Ind. 1994). Thus, a trial court may get it right, but for the wrong reason. *Rimert*, 680 N.E.2d at 871.

122. *Rimert*, 680 N.E.2d at 871-72 (quoting 1A C.J.S. *Actions* § 29 (1985)).

123. *Id.* at 873.

124. *Id.* (citing to IND. CODE § 29-1-2-12.1 (1993) (statute that prohibits beneficiary of life insurance policy who is convicted of murdering the policy holder to recover policy proceeds); *Iemma v. Adventure RV Rentals, Inc.*, 632 N.E.2d 1178 (Ind. Ct. App. 1994) (one who commits arson to gain insurance proceeds is barred from recovery)).

125. *Id.* at 874.

126. *Id.*

In enacting the new public policy, the court noted an important limitation to the public policy bar. As it is written, the policy applies to cases where the plaintiff is responsible for her criminal act. A problem arises when it is unclear whether or not the plaintiff is legally responsible for the act. The court held that to prohibit the imposition of liability onto the culpable party when a plaintiff is not responsible for the act or acts in question is unjust.¹²⁷ Thus, the public policy bar adopted in *Rimert* does not operate to the extent that the individual is not responsible for the criminal act in question.

The court concluded that the public policy bar of *Rimert* applied because Gary was found to be *criminally responsible* for the murders by a South Carolina jury.¹²⁸ Thus, he should not be allowed to recover damages from the PCF.

VI. LIABILITY OF INDEPENDENT CONTRACTORS

Within six months time both the Indiana Supreme Court and the Seventh Circuit Court of Appeals upheld the exception to Indiana's acceptance rule, more commonly referred to as the "humanitarian exception."¹²⁹ Indiana's acceptance rule was adopted to relieve contractors of liability after their work has been accepted and completed.¹³⁰ Thus, under Indiana law, contractors do not owe a duty of care to third parties for construction flaws after the owner has accepted the work. An exception to the rule exists where the work is deemed dangerously defective, inherently dangerous, or imminently dangerous such that it poses a risk of imminent personal injury to third parties.¹³¹

In *Blake v. Calumet Construction Corp.*,¹³² Blake, an employee of Morrison, a contractor on a construction site, was injured after he tripped and fell approximately four feet to the concrete floor. Calumet was another contractor on site hired to construct the loading dock, including guard rails, adjacent to a maintenance building. Morrison and Calumet were working under the direction of United Engineers, a project manager coordinating the work of all contractors. Blake left the maintenance building through a door to the unlit loading dock area. Not familiar with the loading dock, Blake tripped and fell and sustained a fractured hip and other injuries. Soon thereafter, he brought an action against Calumet for injuries sustained, alleging that Calumet's negligence in failing to install guard rails caused his injuries.

Calumet moved for summary judgment, arguing that it owed no duty of care

127. *Id.* at 874-75.

128. *Id.* at 876.

129. See *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167 (Ind. 1996); *Bush v. Seco Elec. Co.*, 118 F.3d 519 (7th Cir. 1997).

130. *Daugherty v. Herzog*, 44 N.E. 457 (Ind. 1896), is the seminal Indiana case holding that a contractor's duty of care to third parties is extinguished upon acceptance of the work. *Blake*, 674 N.E.2d at 170.

131. *Blake*, 674 N.E.2d at 172-73 (citing *Citizen's Gas & Coke Util. v. American Econ. Ins. Co.*, 486 N.E.2d 998 (Ind. 1985)).

132. *Id.* at 167.

to Blake on the night of the injury.¹³³ In support, Calumet argued that its work on the loading dock had been accepted as a matter of law by the owner (I/N Tek) because Calumet's billing records indicated that I/N Tek had paid for the loading dock in full two months before Blake's fall. Calumet also argued that it had relinquished physical control of the loading dock area before November 3, 1989, indicating an acceptance of its work by I/N Tek. Notwithstanding acceptance of its work, Calumet argued that the guard rails were installed before November 3, 1989, but had been removed by a third party. The trial court granted Calumet's motion for summary judgment and, on appeal, the court of appeals affirmed.¹³⁴ Blake appealed and the supreme court reversed and remanded the case.

The supreme court initially addressed the issue of duty at common law,¹³⁵ stating that the imposition of a duty is covered by a line of decisions dealing specifically with contractors' liability to third parties for construction flaws.¹³⁶ The court stated that "under this line of authority duty in this case turns on two factual issues: did the owner accept the loading dock before the accident occurred and, if so, did the loading dock nonetheless present a risk of imminent personal injury as to that time?"¹³⁷

The supreme court revisited the seminal case of a contractor's duty of care to third parties, *Daugherty v. Herzog*,¹³⁸ stating that in the present case there were conflicting factual signs as to whether I/N Tek or United had interposed itself, in the manner contemplated by *Daugherty*, to break the causal connection between Calumet and Blake so as to relieve Calumet of its duty of care.¹³⁹

The court held that the "fact of payment alone cannot support summary judgment because payment could have occurred for a number of reasons, including mindless processing of submitted paperwork."¹⁴⁰ The court also held that there was nothing in the record to support Calumet's claim that United or I/N Tek had asserted physical control over the loading dock.¹⁴¹

The supreme court went on to address the remaining question of whether or not the loading dock was "imminently dangerous" as a matter of law. The court

133. *Id.* at 169.

134. *Id.*; see *Blake v. Calumet Constr. Corp.*, 648 N.E.2d 1250, 1253 (Ind. Ct. App. 1995).

135. *Blake*, 674 N.E.2d at 170. In deciding whether to impose a duty at common law, the court usually considers three factors: (1) the relationship between the parties; (2) the foreseeability of the harm; and (3) public policy concerns. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

136. *Id.*

137. *Id.*

138. 44 N.E. 457 (Ind. 1896).

139. *Blake*, 674 N.E.2d at 171. In *Daugherty*, the court held that the factors informing the acceptance inquiry include whether (1) the owner or its agent reasserted physical control over the premises or instrumentality; (2) the work was actually completed; (3) the owner expressly communicated an acceptance or release of liability; or (4) the owner's actions permit a reasonable inference that the work was accepted. *Id.* (citing *Daugherty*, 44 N.E. at 457).

140. *Id.*

141. *Id.* at 172.

held that the lack of a safety device on a darkened construction site is enough to present a jury question on whether or not the loading dock was imminently dangerous.¹⁴² The court, using the definition of "imminently dangerous" as defined in *Black's Law Dictionary*,¹⁴³ stated that a jury could find that the loading dock, without guard rails, on the night of Blake's fall was reasonably certain to place life or limb in peril. Thus, assuming arguendo that the jury finds I/N Tek accepted Calumet's work before Blake's fall on November 3, 1989, Calumet may not be absolved from liability because the humanitarian exception may apply if the jury finds that the lack of guard rails on the loading dock presented an *imminent risk* of personal injury to third parties.¹⁴⁴

One month after the court's decision in *Blake*, the Seventh Circuit Court of Appeals heard oral argument on this issue in *Bush v. Seco Electric Company*.¹⁴⁵ The court rendered its decision five months later. Bush, a temporary employee at Rumpke Recycling, was injured by a conveyor and sued Seco for negligence in the installation of the conveyor's wiring. Seco had wired the conveyor almost four weeks before the plaintiff's accident. Delivery trucks would drop cans into a pit and the conveyor would pick them up and deposit them in a hopper. Whenever the conveyor failed, someone had to go into the pit, pick up the cans, dump them in garbage bags, and haul the bins out. There was a safety protocol in place at the time of Bush's accident.

On the day of Bush's accident, the conveyor failed and she was chosen to clean the pit. She claims that she was not aware of the safety protocol and did not shut the conveyor off. The safety guard to the conveyor was not in place (the safety guard made it impossible to feed cans into the conveyor) and the conveyor snagged Bush's clothes. As a result, Bush lost her arm.

Unlike the acceptance argument in *Blake*, it was not in dispute that Rumpke had accepted Seco's wiring job. The conveyor had been operating for four weeks when Bush was injured. Also, there was no dispute that Rumpke had control of the conveyor. However, Bush argued that her case fit into a narrow "humanitarian exception," thereby defeating the longstanding acceptance rule.¹⁴⁶ She argued that absence of an emergency stop button in the pit created a risk of imminent personal injury.¹⁴⁷ Seco moved for summary judgment and the District Court granted its motion, holding that Seco did not owe Bush a duty of care.¹⁴⁸

While Bush was awaiting oral argument, the Indiana Supreme Court recast

142. *Id.* at 173.

143. Work is "imminently dangerous" if it "is reasonably certain to place life or limb in peril." BLACK'S LAW DICTIONARY 750 (6th ed. 1990).

144. Plaintiffs must do more than simply plead "dangerously defective," "inherently dangerous" or "imminently dangerous" to avoid summary judgment. Some evidence must be presented tending to show the work or instrumentality presented an *imminent risk* of personal injury to third parties.

145. 118 F.3d 519 (7th Cir. 1997).

146. *Id.* at 521.

147. *Id.*

148. *Id.*

the acceptance rule in *Blake v. Calumet Construction Corp.*¹⁴⁹ Although the court in *Blake* used terms like “expectable,” “reasonable,” and “foreseeable,” words that are foreign to the privity analysis of the acceptance rule, as well as visited the idea of rejecting the acceptance rule in favor of a “Palsgraf like foreseeability standard,”¹⁵⁰ the court did not set aside the acceptance rule.

The Seventh Circuit found that the humanitarian exception was widened by *Blake* enough and reshaped the acceptance rule.¹⁵¹ The court relied upon language from *Blake* which states, “[w]here a contractor hands over work ‘in a defective or dangerous state’ ‘important considerations of deterrence and prevention militate in favor of imposing an ongoing duty of care.’”¹⁵² The court went on to state that “the spirit of *Palsgraf* is evident in *Blake*’s elaboration of the humanitarian exception.”¹⁵³ The court relied upon the definitions of “dangerously defective” and “imminently dangerous” that the Indiana Supreme Court adopted in *Blake* in reaching its decision. The Seventh Circuit held that “Seco’s wiring would be ‘dangerously defective’ if the work is turned over in a condition that has a propensity for causing physical harm to foreseeable third parties using it in reasonably foreseeable ways.”¹⁵⁴ The court also held that Seco’s “work might be ‘imminently dangerous’ if it is reasonably certain to place life or limb in peril.”¹⁵⁵ The Seventh Circuit also stated that, because *Bush* was decided under pre-*Blake* law and that *Blake* has shifted the acceptance rule enough “to make extrapolating from the district court’s decision little more than divination,”¹⁵⁶ the district court must take a second look. The court held that a reasonable jury could conclude that the absence of an emergency stop button in the pit was reasonably certain to place life or limb in peril.¹⁵⁷

Based upon the decisions in *Blake* and *Bush*, it appears that the long standing acceptance rule survives despite the supreme court’s references to applying a Palsgraf foreseeability standard in view of the rule. However, in what form does it apply? The Indiana Supreme Court in *Blake* applied the acceptance rule as it was stated in *Daugherty*, but similar to other decisions, did not elaborate on the underlying rationale for terminating the contractor’s duty of care upon acceptance.

The Seventh Circuit has interpreted the Indiana Supreme Court’s decision in *Blake* as an expansion of the humanitarian exception to the acceptance rule.¹⁵⁸ However, such an interpretation appears misplaced as *Blake* does not expand the humanitarian exception.

149. 674 N.E.2d 167 (Ind. 1996).

150. *Id.* at 170 n.1.

151. *Bush*, 118 F.3d at 522.

152. *Id.* at 521 (citing *Blake*, 674 N.E.2d at 173).

153. *Id.*

154. *Id.* (citing *Blake*, 674 N.E.2d at 173 n.6).

155. *Id.* (citing *Blake*, 674 N.E.2d at 173 n.8).

156. *Id.* at 522.

157. *Id.*

158. *Id.* at 521.

VII. GOVERNMENTAL ENTITIES AND IMMUNITY

A. Existence of Public/Private Duty

In *Willis v. Warren Township Fire Department*,¹⁵⁹ the Indiana Court of Appeals was called upon to determine if a governmental entity, the Warren Township Fire Department, owed a private duty to homeowners. The Willises filed a complaint for damages against the fire department, alleging that the department "negligently failed to completely extinguish the fire and the fire rekindled damaging the [Willises] home and personal property."¹⁶⁰ The department responded to a reported gasoline fire in the Willises' garage at approximately 4:03 p.m. and upon arrival extinguished what they observed to be a localized fire in one-half of the garage. The firefighters left the garage approximately one hour after their arrival. The fire department was again called to respond to a second fire at the Willises' home at approximately 8:15 p.m. later that evening. Upon arrival, the firefighters extinguished the fire and left the scene at 10:58 p.m.

In response to the Willises' complaint, the department raised as an affirmative defense that it was immune from liability under section 34-4-16.5-3 of the Indiana Code.¹⁶¹ The Willises filed a motion for summary judgment on the issue of the fire department's immunity. The trial court held that the department was immune from liability.¹⁶² The Indiana Court of Appeals reversed on the basis that the department's decision to leave the Willises' home was an operational function which did not fall within the scope of statutory immunity.¹⁶³ Upon remand to the trial court, the department filed a motion for summary judgment, alleging that it owed no private duty to the Willises.¹⁶⁴ The court granted summary judgment in favor of the fire department.¹⁶⁵ The Willises appealed.

159. 672 N.E.2d 484 (Ind. Ct. App. 1996).

160. *Id.* at 485.

161. *Id.*

162. *Id.* at 486. The trial court concluded that the fire department was immune from liability pursuant to section 34-4-16.5-3 of the Indiana Code which provides as follows:

A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from: . . .

(6) the performance of a discretionary function; . . .

(11) failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety[.]

IND. CODE § 34-4-16.5-3(6), (11) (Supp. 1997).

163. *Willis*, 672 N.E.2d at 486.

164. *Id.*

165. *Id.*

The court of appeals first addressed the issue of the existence of a private duty. The court noted that the existence of a duty is normally a question of law for the court.¹⁶⁶ The court noted the three factors that must be balanced in determining whether a duty exists: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns.¹⁶⁷ However, to recover against a governmental entity for negligence, plaintiffs must show more than a duty owed to the public as a whole; they must show that the relationship between the parties is one that gives rise to a specific or private duty owed to the plaintiffs.¹⁶⁸

The firefighters designated evidence to establish that they followed the normal procedure for extinguishing a fire and the Willises designated evidence which showed that Mrs. Willis was concerned that the fire was not completely extinguished and that the firefighters did not share her concern. The court of appeals held that there was no evidence present to show that a specific or private duty was created between the fire department and the Willises.¹⁶⁹ The court stated that for a private duty to exist, the Willises must show that the firefighters duty is "in no way different from its duty to any other citizen."¹⁷⁰ There was no evidence in this case to establish such a duty.¹⁷¹ In fact, the court of appeals made reference to its holding in *City of Hammond v. Cataldi* that a fire department's "attempt to extinguish [a] fire [is] made in response to its general duty to protect the safety and welfare of the public."¹⁷² Thus, the Indiana Court of Appeals held that the trial court was correct as a matter of law in granting summary judgment for the department.¹⁷³

Judge Staton concurred with Judge Chezem but issued a separate opinion. In his opinion, he highlighted the limited nature of the public/private duty analysis contained in *Mullin v. Municipal City of South Bend*.¹⁷⁴ Judge Staton laid out the three part test that the Indiana Supreme Court adopted in *Mullin* as the test to determine whether a governmental agency owes a private duty to a particular plaintiff. In *Mullin*, the court held that a private duty will be imposed on the government only where each of three elements are present: (1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party; (2) knowledge on the part of the municipality that inaction could lead to harm; and (3) justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking.¹⁷⁵ The court

166. *Id.* (quoting *Mullin v. Municipal City of South Bend*, 639 N.E.2d 278, 283 (Ind. 1994)).

167. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

168. *Id.* (citing *Greathouse v. Armstrong*, 616 N.E.2d 364, 368 (Ind. 1993)).

169. *Id.* at 487.

170. *Id.* at 486 (quoting *City of Hammond v. Cataldi*, 449 N.E.2d 1184, 1188 (Ind. Ct. App. 1983)).

171. *Id.* at 487.

172. *Id.* at 486 (quoting *Cataldi*, 449 N.E.2d at 1188).

173. *Id.*

174. 639 N.E.2d 278 (Ind. 1994).

175. *Willis*, 672 N.E.2d at 487 (citing *Mullin*, 639 N.E.2d at 284).

explained further that "the relationship between the governmental entity and the injured person must be such that the governmental entity has induced the injured person justifiably to rely on its taking action for the benefit of that particular person to his detriment."¹⁷⁶ Thus, application of the public/private duty analysis of *Mullin* is limited to situations involving the government's failure to act.¹⁷⁷

Judge Staton held that *Mullin* was inapplicable to the present case because the Willises did not allege that they suffered an injury due to inaction by the department.¹⁷⁸ Judge Staton further held that *Mullin* applies only to the separate question of what duty a governmental agency might have to dispatch emergency services to the scene of a calamity and not to whether or not the department had a duty to extinguish the fire in a non-negligent manner as was the question in *Willis*.¹⁷⁹

Almost one month after the *Willis* case, the court of appeals once again addressed whether or not a private duty existed between a governmental entity and a particular entity. In *Benthal v. City of Evansville*,¹⁸⁰ the court revisited the three part test of *Mullin* and clarified when it is to be applied. The court held that *Mullin* applies only in those situations where the "governmental entity is aware of the plight of a particular individual and leads that person to believe that governmental rescue services will be used, and the individual detrimentally relies on that promise."¹⁸¹

In *Benthal*, the wife of the decedent brought an action against the city of Evansville and Vanderburgh County for wrongful death, alleging that the police department and sheriff department negligently responded to the automobile accident which resulted in the death of her husband. On October 26, 1992, the decedent left his home enroute to his parents' home in Vanderburgh County. Early the next morning, October 27, 1992, the sheriff's department arrived at the scene of an accident on Hillsdale Road near the decedent's parents' home. The decedent's car was found overturned in a field approximately 17 feet east of Old State Road, near the intersection of Hillsdale Road and Old State Road. After an hour long search, the sheriff's deputies had not located the decedent or any other person at the scene. The sheriff did not resume the search the following day.

On October 28, 1992, the decedent's wife reported to the Evansville City Police Department that her husband and his car were missing. She provided the police with a description of her husband and the car, and advised them that her husband's last whereabouts was at or near his parents' home. Neither the police nor the sheriff's department informed the plaintiff of the accident on Hillsdale Road. Almost one month after the accident, two pedestrians found the decedent's body located about seventeen feet east of Old State Road and approximately 100 feet east of the accident scene. Thereafter, the plaintiff

176. *Id.* at 488 (citing *Mullin*, 639 N.E.2d at 284).

177. See *Henshilwood v. Hendricks County*, 653 N.E.2d 1062, 1067 (Ind. Ct. App. 1995).

178. *Willis*, 672 N.E.2d at 488.

179. *Id.*

180. 674 N.E.2d 580 (Ind. Ct. App. 1996).

181. *Id.* at 584.

searched her husband's car, which was still being stored at a towing company, and found a "dog tag" key chain still in the ignition which provided the decedent's name and address.

First, the court addressed whether or not the county owed a duty to the decedent to investigate the scene of the accident to find any possible victims. The plaintiff argued that had the sheriff's deputies conducted a thorough search, they could have located the decedent, provided medical care, and possibly saved his life.¹⁸² The plaintiff also raised a question of whether the sheriff's actions in removing the car and failing to contact either the owner of the car or decedent's wife prevented others from coming to his aid.¹⁸³

The court concluded that the plaintiff failed to show the existence of a private duty as required by the *Mullin* test.¹⁸⁴ In reaching this conclusion, the court stated that "[t]he mere existence of rescue services does not, standing alone, impose upon the governmental entity a duty to use them for the benefit of [a] particular individual."¹⁸⁵ The court went on to state that "the governmental entity must know that an identified person is in need of assistance and must make an assurance, either directly or indirectly, to that identified person that a specific manner of assistance will be rendered," before a private duty can arise.¹⁸⁶ In this case, the police department did not make any representation to the decedent or anyone acting on his behalf. The court also noted that an injured person must have some knowledge of the government's assurance to render assistance before a private duty is found.¹⁸⁷ The court reasoned that although the decedent may have assumed that upon discovering his damaged car someone would come to his aid, that alone is insufficient to establish a duty because the decedent did not have either direct contact with the police or knowledge that the police had made an explicit assurance to provide rescue services.¹⁸⁸ The court concluded that without an explicit assurance from the county, there can be no reliance.¹⁸⁹

Next the court addressed the plaintiff's claim that the police department created a duty once the sheriff's deputies began their investigation.¹⁹⁰ The court did not agree. In reaching its decision, the court recognized the distinction between non-feasance and mis-feasance under Indiana law and stated that "an affirmative act by the governmental entity does not, in and of itself, establish a private duty. There must be some causal link between the affirmative act and the victim's peril."¹⁹¹ Applying this reasoning, the court found that a causal link did

182. *Id.* at 583.

183. *Id.*

184. *Id.* at 584.

185. *Id.* (citing *Mullin*, 639 N.E.2d at 284).

186. *Id.*

187. *Id.* (citing *City of Rome v. Jordan*, 426 S.E.2d 861 (1993)).

188. *Id.*

189. *Id.*

190. *Id.* at 584 n.2.

191. *Id.* at 585 (citing *Henshilwood v. Hendricks County*, 653 N.E.2d 1062, 1064-65, 1068 (Ind. Ct. App. 1996)).

not exist.¹⁹² The court held that the decedent's perilous situation resulted from his car accident and that the plaintiff failed to show that any affirmative act of negligence by the county to the decedent's peril.¹⁹³

B. Interpretation of Indiana Code § 34-4-1-16.5-3(4)

In a case of first impression, the Indiana Court of Appeals decided a case in which section 34-4-16.5-3(4) of the Indiana Code was interpreted.¹⁹⁴

In *City of Peru v. Brooks*,¹⁹⁵ a bicycle rider brought an action against the city and the city's park department to recover damages for injuries he suffered when he drove off the end of an incomplete bridge over a creek in the city park. Peru answered the plaintiff's complaint, raising the affirmative defense of immunity under the Indiana Tort Claims Act.¹⁹⁶ Peru subsequently filed a motion for summary judgment which was later denied.¹⁹⁷ Thereafter, the trial court certified the order for interlocutory appeal.¹⁹⁸

For the first time, the court was faced with interpreting section 34-4-16.5-3(4) of the Indiana Code to determine whether or not the city was immune from liability. In doing so, the court relied upon the dictionary to ascertain the plain and ordinary meaning of the undefined term in the statute: "unpaved."¹⁹⁹

In June 1993, the Peru Park Maintenance Department sponsored a volunteer day at Maconaquah Park in Peru, Indiana. Volunteers from Peru and the county helped to clean up the park. During cleanup, a group of volunteers gathered heavy wood planks from a wooden area and constructed a bridge across a creek located forty or fifty feet from the wooded area. The volunteers did not complete the bridge and, although the bridge had a dirt ramp leading up to it on one end, the other end had a drop off of approximately two feet. On August 29, 1993, Brooks and his wife were riding their bikes in the park. Brooks rode his bike down the dirt path and onto the bridge and when he reached the far end of the bridge, the front tire of his bike went over the edge of the drop off, causing him to flip over his handlebars. Brooks landed on his head, neck and shoulders and suffered a broken neck.

Peru argued that the trial court erred in denying its motion for summary judgment because the city is immune from liability pursuant to section 34-4-16.5-

192. *Id.*

193. *Id.*

194. Section 34-4-16.5-3 states in part: "A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from: . . . (4) the condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area." IND. CODE § 34-4-16.5-3((4)) (1993 & Supp. 1997).

195. 676 N.E.2d 393 (Ind. Ct. App. 1997).

196. *Id.* at 394.

197. *Id.*

198. *Id.*

199. *Id.* at 395 (citing *State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 347 (Ind. Ct. App. 1995)).

3(4) of the Indiana Code. Peru urged the court to apply California and Illinois law in interpreting the code section because there was no Indiana case law applying this specific provision. However, the court held that there was no need to apply California and Illinois law because, on its face, the statute is clear and unambiguous and when a statute is clear and unambiguous on its face, the court may not interpret it but instead must hold the statute to its clear and plain meaning.²⁰⁰ The court will use the common and ordinary meaning of the words contained in the statute.²⁰¹

In deciding the case, the court of appeals recited the plain, common sense meaning of the code section as follows:

The plain, common sense meaning of the statute is that while a governmental entity is immune from liability when a loss results from the natural condition of a road, trail, or footpath, the entity will not be immune where a loss results from improvements the entity has made to such road, trail, or footpath.²⁰²

Because “unpaved” was not defined in the statute, the court of appeals adopted the definition of “pave” as listed in the dictionary which states “[t]o cover with any hard, smooth surface that will bear travel.”²⁰³ The Brookses, in their appellee brief, adopted the definition of “pave” as listed in another dictionary: “to lay or to cover with material (as stone or concrete) that forms a firm level surface for travel.”²⁰⁴ Despite Peru’s argument that the bridge was unpaved because it was not covered with stone or concrete, the court of appeals applied its definition of “pave” and held that the wooden planks were utilized to form a hard, smooth surface covering the creek so that persons could travel across the creek; therefore, the bridge constituted a paved surface and was not within the scope of the statute.²⁰⁵ Thus, the trial court’s denial of Peru’s motion for summary judgment was affirmed.²⁰⁶

C. Interpretation of Indiana Code § 34-4-16.5-3(9)

One month after its decision in *Shand Mining, Inc. v. Clay County Board of Commissioners*,²⁰⁷ the Indiana Court of Appeals was called upon to once again address whether a governmental entity which contracts with another to perform a traditional government function could avoid liability under section 34-4-16.5-3(9) of the Indiana Code for damage based on the contract. This section provides

200. *Id.* at 394 (citing *Hendricks County Bd. of Zoning Appeals v. Barlow*, 656 N.E.2d 481 (Ind. Ct. App. 1995)).

201. *Id.* at 395.

202. *Id.*

203. *Id.* (quoting *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 962 (1981)).

204. *Id.* (quoting *WEBSTER’S NEW COLLEGIATE DICTIONARY* 841 (1981)).

205. *Id.*

206. *Id.*

207. 671 N.E.2d 477 (Ind. Ct. App. 1997).

that a governmental entity is immune from liability for damages which result from the acts or omissions of anyone other than the governmental entity.²⁰⁸

In *City of Vincennes v. Reuhl*, Reuhl brought an action against the city of Vincennes, EMC (the independent contractor with whom the city had an agreement to operate and maintain its wastewater facility), and Rogers Construction (a paving contractor with whom the city contracted to resurface various streets within the city) for damages and injuries that she suffered when she stepped into a hole next to a sewer grate in Vincennes, Indiana. In her complaint, Reuhl claimed that the defendants negligently dug the hole, failed to repair the hole, and failed to warn her of the hole.²⁰⁹ EMC filed a cross claim against Vincennes, alleging that EMC was entitled to indemnity pursuant to their agreement with Vincennes for damages resulting from the city's negligence.²¹⁰ Thereafter, Vincennes filed a motion for summary judgment on Reuhl's complaint and EMC's cross claim. The trial court denied Vincennes' motion²¹¹ and the city petitioned the trial court to certify for interlocutory appeal of the denial of its motion.

The city argued that it was entitled to governmental immunity because the damage to Reuhl was caused by the acts or omissions of EMC and Rogers, relying upon section 34-4-16.5-3(9) of the Indiana Code. The Indiana Court of Appeals correctly followed its holding in *Shand Mining* and found that Vincennes was not immune from liability.²¹² The court applied the exception to the general rule that "a principal who delegates a duty to an independent contractor is not liable for the negligence of that independent contractor in performing the duty"²¹³ in deciding that Vincennes could not absolve itself from liability on the basis of its delegation. In applying the exception, the court held that where the principal is by law or contract charged with performing specific duties, those duties are considered non-delegable.²¹⁴ In Indiana, governmental entities are charged with specific obligations with respect to public travel.²¹⁵ Just as the county was charged by law to maintain public travel in *Shand Mining*, Vincennes was also charged by law to maintain public travel. The court held that although Vincennes properly exercised its discretion to delegate its duty to maintain the sewers and streets, it was not entitled to immunity.²¹⁶

Next, the court of appeals addressed EMC's cross claim for indemnity. Vincennes argued that pursuant to Indiana's Comparative Fault Act (CFA) it

208. IND. CODE § 34-4-16.5-3(9) (1993 & Supp. 1997).

209. *Id.* at 497.

210. *Id.*

211. *Id.*

212. *Id.* at 498.

213. *Shand Mining*, 671 N.E.2d at 481.

214. *Id.*

215. *Reuhl*, 672 N.E.2d at 497 (citing *City of Indianapolis v. Cauley*, 73 N.E. 691, 693-94 (1905)).

216. *Id.* at 497-98.

would not owe indemnification to EMC.²¹⁷ Under the CFA, a jury is charged with allocating 100% of the fault among all culpable parties and non-parties.²¹⁸ Tort claims against governmental entities do not fall within the purview of the CFA; however, a jury is still permitted to consider governmental entities' negligence in its allocation of fault. Thus, under the CFA, EMC's potential liability is limited to its own portion of fault as it cannot be held liable for Vincennes' negligence.²¹⁹ Therefore, the court held that the hold harmless agreement between Vincennes and EMC was unnecessary and the trial court erred in denying Vincennes' motion for summary judgment on EMC's cross claim for indemnity.²²⁰

D. Indiana's "Planning-Operational Test"

During the survey period, the Indiana Court of Appeals once again relied on Indiana's "planning-operational test" that the supreme court adopted in *Peavler v. Board of Commissioners*²²¹ in holding that a city was immune from liability.

In *Lee v. State*,²²² Elizabeth Lee, mother of Michaelynn Lee, an automobile passenger who died in an accident after the driver of the vehicle failed to successfully negotiate a series of curves on State Road 7 in Wirt, Indiana, brought a wrongful death action against the Indiana and the Indiana Department of Transportation (INDOT). Lee averred in her complaint that INDOT was negligent for improperly designing and constructing State Road 7, failing to properly warn motorists of the unreasonably dangerous nature of State Road 7, failing to maintain State Road 7 so as to prevent injury to motorists, and failing to eliminate the known dangerous condition of State Road 7. The State and INDOT moved for summary judgment, arguing that it was immune from liability pursuant to the doctrine of discretionary function immunity. The trial court granted summary judgment for the State and INDOT and the plaintiff appealed.²²³ The court of appeals affirmed the trial court's holding that INDOT's improvement of curves was in the planning phase at the time of the accident such that the State and INDOT were entitled to governmental immunity under the Tort Claims Act for a discretionary decision to correct curves in conjunction with the replacement of the bridge.²²⁴

The evidence presented at the trial court revealed that the incident occurred in the early morning hours of July 2, 1992 in Wirt, Indiana on northbound State Road 7 near the intersection of County Road 480 North. The driver of the

217. *Id.*

218. *Id.* (citing IND. CODE § 34-4-33-5 (1993 & Supp. 1997)).

219. The court stated that if Vincennes had been determined to be immune from liability, summary judgment on EMC's cross claim for indemnity would not have been appropriate. *Id.*

220. *Id.*

221. 528 N.E.2d 40 (Ind. 1988).

222. 682 N.E.2d 576 (Ind. Ct. App. 1997).

223. *Id.* at 577.

224. *Id.*

vehicle failed to successfully negotiate a series of curves located at the Wirt bridge and the vehicle left the roadway, struck a bridge railing, went over an embankment and struck a utility pole.

In reaching its decision, the court of appeals relied on the Indiana Tort Claims Act which provides as follows: "(a) Governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from: . . . (6) the performance of a discretionary function . . ."²²⁵ This section was first construed by the Indiana Supreme Court in *Peavler*.²²⁶ *Peavler* adopted the "planning operational test" and held that a governmental entity will not be held liable for negligence arising from decisions which are made at a planning level as opposed to an operational level.²²⁷

The court of appeals characterized *Lee* as a case of omission and stated that "[w]hen considering cases of omission 'a conscious balancing may be demonstrated by evidence showing that a governmental entity considered improvements of the general type alleged in the plaintiff's complaint.'"²²⁸ According to INDOT's records, the area of the Wirt curves was inspected as early as 1983 when initial data was gathered for the preparation of environmental reports and a determination of project scope concerning the replacement of the bridge located approximately .04 of a mile from the curves. Also, 1984 records reveal that INDOT investigated the Wirt curves for possible replacement. In early 1985, INDOT decided that the bridge and the Wirt Curve Project should be incorporated into one large project, and in May of 1985 the Wirt Curve Project was approved. After several years of revised engineering reports, surveys, and public hearings, the Federal Highway Administration approved the project on August 8, 1992. The contract for the project was awarded in October of 1992 and completed in February of 1994. The decedent's accident occurred on July 2, 1992.²²⁹

Despite the plaintiff's argument that at the time of the accident the project had moved beyond the planning phase, the court held that the operational phase did not begin until after the contract was set for bidding on October 16, 1992.²³⁰ In reaching its decision, the court of appeals relied on the policy underlying government immunity.²³¹ The court held that the Wirt Curve Project, in conjunction with the replacement of the bridge, represented the type of discretionary function that the legislature intended to protect and thus the Indiana Department of Transportation should be shielded from liability.²³²

225. *Id.* at 578 (quoting IND. CODE § 34-4-16.5-3(6) (Supp. 1997)).

226. 528 N.E.2d at 40.

227. *Id.* at 48.

228. *Lee*, 682 N.E.2d at 578 (quoting *Voit v. Allen County*, 634 N.E.2d 767, 770 (Ind. Ct. App. 1994)).

229. *Id.* at 579.

230. *Id.*

231. *Id.*

232. The policy underlying governmental immunity is based on the concept of separation of powers between the coordinate branches of government and the notion that we should prevent tort

VIII. COMPARATIVE FAULT

A. Strict Liability in Wild Animal Cases

In a case of first impression, the Indiana Court of Appeals in *Irvine v. Rare Feline Breeding Center, Inc.*²³³ addressed the issue of whether strict liability is the law to be applied in wild animal cases. Generally, the possessor of a wild animal is subject to strict liability for harm done by that animal, but incurred risk and other exceptions or defenses may apply.²³⁴

In *Irvine*, the plaintiff filed a complaint against Schaffer, owner of Rare Feline Breeding Center, Inc., for injuries that he sustained when a male tiger kept on defendant's property attacked him. The plaintiff's complaint contained four counts: negligence, strict liability, nuisance, and punitives. The plaintiff filed a motion for partial summary judgment on the basis that incurred risk and assumption of risk are not valid defenses to a strict liability wild animal claim, that assumption of risk is not available in a non-contract case, and that the defense of open and obvious is not available in an animal liability case.²³⁵ The trial court denied the plaintiff's motion for summary judgment on the strict liability count and issue of assumption of risk and granted summary judgment on the issue of open and obvious.²³⁶ The plaintiff's petition to certify three issues for interlocutory appeal were granted by the trial court.²³⁷

The court first addressed whether strict liability is the common law rule for wild animal cases in Indiana. The court held that although the basic rule has been frequently stated in various cases, there are no Indiana cases where the rule has been specifically applied to true wild animal case.²³⁸ Even in the absence of cases that have applied strict liability to wild animal cases, the court held that "we have little difficulty concluding that Indiana's common law recognized the strict liability rule for wild animal cases. . . ."²³⁹

Next, the court of appeals concluded that Indiana's Comparative Fault Act

actions from becoming a vehicle for judicial review of government policy based decisions. *Id.* (citing *Peavler*, 528 N.E.2d at 44).

233. 685 N.E.2d 120 (Ind. Ct. App. 1997).

234. *Id.* at 121.

235. *Id.* at 122.

236. *Id.* at 123.

237. The trial court granted the plaintiff's petition to certify the following issues: (1) whether incurred risk or other defenses are available in a strict liability case; (2) whether *Irvine* was an invitee as a matter of law; and (3) whether the defense of assumption of risk is available in a non-contractual case. *Id.*

238. *Id.* The court cited *Holt v. Myers*, 93 N.E. 31 (1910) (mentioning wild animal strict liability rule in case which dealt with vicious dog); *Gordan v. Kaufman*, 89 N.E. 898 (1909); and *Bostock-Ferari Amusement Co. v. Brocksmith*, 73 N.E. 281 (1904) (setting out wild animal rule and its rationale, but not applying it because bear's inherent dangerousness was not cause of harm).

239. *Irvine*, 685 N.E.2d at 123.

does not change the common law rule of strict liability in wild animal cases.²⁴⁰ The court noted that the legislature did not intend, by the enactment of a statute, to make changes in the common law beyond what it declares, either in express terms or by unmistakable implication.²⁴¹

Strict liability is not included in the definition of fault as defined in the current form of the Act. Thus, the court held that construing the Act narrowly, it does not explicitly apply to strict liability.²⁴²

The plaintiff argued that no exceptions to strict liability in wild animal cases have ever been applied in Indiana. The court agreed with the plaintiff's contention and stated that in the absence of cases, it must examine the reason behind the strict liability wild animal rule and consult other sources.²⁴³ First, the court recognized that it had previously set out the rationale for imposing strict liability against owners for injuries caused by a naturally ferocious or dangerous animal.²⁴⁴ Strict liability is appropriately placed:

Upon those who, even with proper care, expose the community to the risk of a very dangerous thing . . . the kind of 'dangerous animal' that will subject the keeper to strict liability The possessor of a wild animal is strictly liable for physical harm done to the person of another . . . if that harm results from a dangerous propensity that is characteristic of wild animals of that class. Thus, strict liability has been imposed on keepers of lions and tigers, bears, elephants, wolves, monkeys, and other similar animals.²⁴⁵

The court noted Judge Posner's rationale for the wild animal strict liability rule as set out in *G. J. Leasing Co. v. Union Electric Co.*²⁴⁶ in the following hypothetical:

Keeping a tiger in one's backyard would be an example of an abnormally hazardous activity. The hazard is such, relative to the value of the activity, that we desire not just that the owner take all due care that the tiger not escape, but that he consider seriously the possibility of getting rid of the tiger altogether, and we give him an incentive to consider this course of action by declining to make the exercise of due care a defense to a suit based on an injury caused by the tiger—in order words, by

240. *Id.* at 124.

241. *Id.* at 123 (citing *Rocca v. Southern Hills Counseling Ctr., Inc.*, 671 N.E.2d 913, 920 (Ind. Ct. App. 1996)).

242. *Id.* (citing BLACK'S LAW DICTIONARY 991 (6th ed. 1990)).

243. *Id.*

244. *Id.* (citing *Hardin v. Christy*, 462 N.E.2d 256, 259, 262 (Ind. Ct. App. 1984) (citing W. PROSSER, LAW OF TORTS (4th ed. 1971))).

245. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 76, at 541-42 (5th ed. 1984)).

246. 54 F.3d 379 (7th Cir. 1995).

making him strictly liable for any such injury.²⁴⁷

The court analyzed the rationale for applying the rule and next looked at whether any exceptions or defenses to the rule were appropriate. In doing so, the court turned to section 507 of the *Restatement (Second) of Torts*.²⁴⁸ Section 510(a) provides: "The possessor of a wild animal . . . is subject to strict liability for the resulting harm, although it would not have occurred but for the unexpected . . . innocent, negligent or reckless conduct of a third person."²⁴⁹ Section 513 provides: "The possessor of a wild animal . . . who keeps in upon land in his possession, is subject to strict liability to persons coming upon the land in the exercise of a privilege whether derived from his consent to their entry or otherwise." Yet, if the invitee or licensee "knows that the dangerous animal is permitted to run at large or has escaped from control they may be barred from recovery if they choose to act upon the possessor's consent or to exercise any other privilege and thus expose themselves to the risk of being harmed by the animal."²⁵⁰

Section 515(2) provides: "The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk that a wild animal . . . will do harm to his person . . . is a defense to the strict liability."²⁵¹ Comment d to section 515(2) states: "This kind of contributory negligence, which consists of voluntarily and unreasonably encountering a known danger, is frequently called either contributory negligence or assumption of risk, or both."²⁵²

The court concluded that the *Restatement* clearly recognizes exceptions or defenses to wild animal strict liability and that it is "keeping with Indiana's recent policy regarding allocation of fault"²⁵³ and adopted the *Restatement's* approach in wild animal cases.²⁵⁴

247. *Irvine*, 685 N.E.2d at 124-25 (quoting *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d at 386.

248. Section 507 provides:

- (1) A possessor of a wild animal is subject to liability to another for harm done by the animal to the other, his person, land or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent it from doing harm.
- (2) This liability is limited to harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know.

RESTATEMENT (SECOND) OF TORTS § 507 (1977).

249. *Id.* § 510(a).

250. *Id.* § 513.

251. *Id.* § 515(2).

252. *Id.*

253. *Irvine*, 685 N.E.2d at 126.

254. *Id.*

B. Comparative Fault Jury Instruction

During this survey period, the court was called upon once again to address the issue of the comparative fault jury instruction. In *Lueder v. Northern Indiana Public Service Co.*,²⁵⁵ the court held that a jury instruction, stating that the worker's employer and/or co-workers had been negligent if they violated certain statutory provisions, was improper because it invited the jury to find negligence and allocate fault to the employer and co-workers as unnamed non-parties in violation of the Comparative Fault Act.²⁵⁶ Lueder was injured after the boom of his crane came in contact with an overhead electrical line at a construction site. Lueder sued NIPSCO, alleging that the electrical line was too low. A jury returned a verdict for NIPSCO, finding that NIPSCO's conduct was not a proximate cause of Lueder's injury and Lueder appealed.²⁵⁷

Lueder argued that the trial court erred in giving the jury an instruction and verdict form that improperly invited the jury to allocate fault to his employer and co-workers who were unnamed non-parties.²⁵⁸ Lueder cited *Kveton v. Siade*²⁵⁹ to support his argument. *Kveton* held that under the Comparative Fault Act (CFA), a defendant must affirmatively plead as a defense that the damages of the claimant were caused in full or in part by a non-party and if the evidence is sufficient to support this defense, the verdict form shall require a disclosure of the name of the non-party and the percentage of fault charged to the non-party.²⁶⁰ The court held that the trial court had erred in giving an instruction that invited the jury to determine the fault of an unnamed non-party because the CFA requires that fault and damages be allocated to only named non-parties.²⁶¹

In response, NIPSCO relied on the holding in *Evans v. Schenk Cattle Co.*²⁶² In *Evans*, the plaintiff was injured while operating a bulldozer for his employer on the farm of the defendant. The jury returned a verdict for the defendant and Evans appealed, challenging the refusal of an instruction that instructed the jury that they could not consider his employer to be at fault. The following instruction was in dispute: "I instruct you, members of the jury, that under the Indiana Comparative Fault law, *you may not consider Harold Wayne Evans' employer, Barney Robinson, to be at fault in this case and, therefore, you may not allow any deduction from plaintiff's recovery for any conduct of Barney Robinson.*"²⁶³ The trial court modified Evans' tendered instruction to delete the italicized text.²⁶⁴

255. 683 N.E.2d 1340 (Ind. Ct. App. 1997).

256. *Id.* at 1346.

257. *Id.* at 1342.

258. *Id.* at 1342-43.

259. 562 N.E.2d 461 (Ind. Ct. App. 1990).

260. *Id.* at 463.

261. *Lueder*, 683 N.E.2d at 1346.

262. 558 N.E.2d 892 (Ind. Ct. App. 1990).

263. *Id.* at 894 (emphasis in original).

264. *Id.*

Evans held that a defendant is permitted to present evidence of the conduct of those who are not non-parties under the statute, and the jury may consider this evidence and draw its own conclusions.²⁶⁵ Thus, it would be incorrect to instruct the jury that it could not consider the employer at fault. The court held that the trial court did not err in refusing the tendered instruction.²⁶⁶

It should be noted that the court of appeals disagreed with the *Evans* holding “insofar as it suggests that the jury can be instructed in a manner that invites them to allocate fault to an unnamed non-party.”²⁶⁷ Instead, this court correctly sided with the holding in *Kveton* that the CFA prohibits instructions that invite the jury to allocate fault to unnamed non-parties.

Thus, it is improper to instruct the jury that specified conduct on the part of the employer or co-workers was negligent. . . . The conduct of the employer and co-workers is relevant only insofar as it negates elements of the plaintiff’s claim; the jury should not be invited to make an affirmative finding of negligence against the employer and co-workers.²⁶⁸

The court held that the trial court erred in giving NIPSCO’s tendered instruction because it “invited the jury to find negligence and thus allocate fault to Lueder’s employer and co-worker in violation of the Comparative Fault Act. . . .”²⁶⁹

IX. LIABILITY OF PUBLIC UTILITIES

A. Indiana Recreational Use Statute (IRUS)

The Indiana Court of Appeals addressed the issue of whether Indiana’s recreational use statute (IRUS)²⁷⁰ provides immunity from tort liability to a public utility in *McCormick v. State of Indiana*.²⁷¹ IRUS protects landowners in lawful possession and control of land from liability if they open their property to the public for recreational use without charging a fee. The purpose for enacting IRUS was to encourage landowners to open their property to the public for recreational purposes free of charge.²⁷² In *McCormick*, Nora McCormick, the wife of the decedent, Paul McCormick, brought a wrongful death action against defendants after her husband was killed when his boat went over the spillway of Morse Reservoir. On June 9, 1990, the decedent took a motorboat out on the reservoir when it was at flood stage. The decedent ended up near the spillway

265. *Id.*

266. *Id.*

267. *Lueder*, 683 N.E.2d at 1346.

268. *Id.*

269. *Id.*

270. IND. CODE § 14-22-10-2 (Supp. 1997).

271. 673 N.E.2d 829 (Ind. Ct. App. 1996).

272. *Id.* at 833 (citing *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1047 (Ind. Ct. App. 1993)).

of the reservoir dam and was unable to start the motor of the boat. He subsequently jumped from the boat just as it was going over the spillway. Despite recovery attempts on June 9 and 10, the decedent's body was not recovered until June 11, 1990.

The court of appeals held that IRUS applied despite McCormick's argument to the contrary, and further concluded that it shielded IWC from liability.²⁷³ McCormick argued that IRUS did not apply because the reservoir is a "public water"²⁷⁴ and must be held open to the public because of its designation.²⁷⁵ Thus, the purpose of IRUS is not served by applying it to the reservoir. The court of appeals disagreed and held that although the reservoir is a "public water" of the State of Indiana, it is owned by IWC and is private property.²⁷⁶ Absent a law that requires IWC to hold the reservoir open to the public, the State can not compel it to do so as such an order would amount to a confiscation or taking of property.²⁷⁷ Thus, IWC is afforded the same protection as other landowners who open their property to the public for recreational use.²⁷⁸

Next, McCormick argued that IRUS should not apply in this case because the spillway was a restricted area and the purposes of IRUS is to encourage landowners to open their property to the public for recreational use.²⁷⁹ McCormick cited *Pulis v. T.H. Kinsella, Inc.*²⁸⁰ as authority analogous to the present case. In *Pulis*, a driver of an all-terrain vehicle was injured when he ran into a cable that was stretched across an entrance to a gravel pit. The court in *Pulis* held that IRUS did not apply because it was intended to apply only to property that was suitable and appropriate for recreational purposes and the gravel pit was not suitable for such use.²⁸¹ However, the court of appeals disagreed with McCormick's use of *Pulis*.

The court of appeals distinguished the facts of *Pulis* from this case by saying that in *Pulis* there were two separate areas of land, both of which were readily distinguishable from each other and easily segregable.²⁸² Thus, it was logical to not apply the recreational use statute to the land which should not be held open to the public.²⁸³ The court of appeals stated, unlike the land in *Pulis*, the spillway could not be separated from the rest of the reservoir as the reservoir is one body

273. *Id.*

274. A "public water" is defined as "every lake, river, stream, canal, ditch and body of water that is subject to the jurisdiction of the State of Indiana, or owned or controlled by a public utility. *Id.* (citing IND. CODE § 14-1-1-1 (1993)).

275. *Id.* at 834.

276. *Id.*

277. *Id.*

278. The court of appeals held that the fact that IWC is also a public utility does not make the reservoir public property. *Id.*

279. *Id.*

280. 593 N.Y.S.2d 959 (N.Y. Sup. Ct. 1993), *aff'd*, 204 A.D.2d 976 (N.Y. App. Div. 1994).

281. *McCormick*, 673 N.E.2d at 835 (citing *Pulis*, 593 N.Y.S.2 at 961).

282. *Id.*

283. *Id.*

of water and the spillway essentially is a part of it. The court held that it could not apply IRUS to the spillway alone because the only feasible alternative would be to close the reservoir.²⁸⁴

The court of appeals went on to conclude that McCormick did not produce any evidence from which one could reasonably conclude that IWC "desired, induced, encouraged or expected the decedent to enter the reservoir."²⁸⁵ The court concluded that evidence established that IWC merely gave the decedent permission to enter the reservoir and not an invitation; mere permission of IWC made the decedent a licensee and not an invitee, public or otherwise, as McCormick alleged.²⁸⁶ Thus, the court of appeals did not accept McCormick's argument that IRUS did not apply because IWC breached its duty of reasonable care to the decedent.²⁸⁷

B. Duty Owed to Motorists

In *Goldsberry v. Grubbs*,²⁸⁸ the plaintiff, Cynthia Goldsberry, brought suit against several defendants, including General Telephone Company of Indiana, Inc. (GTE) for injuries sustained when her automobile, operated by Eddie Grubbs, left the traveled portion of State Road 119 in Elkhart County, traveled down an embankment, and collided with a telephone pole. The accident rendered Goldsberry a quadriplegic and she brought suit against GTE for negligent installation and placement of the telephone pole. GTE filed a motion for summary judgment on the ground that it owed no duty to Goldsberry upon which to base a negligence action.²⁸⁹ The trial court granted GTE's motion for summary judgment and Goldsberry appealed.²⁹⁰

In reversing the award of GTE's motion for summary judgment, the court of appeals noted the inconsistent application of the *Webb* formula that was adopted by the supreme court in *Webb v. Jarvis*²⁹¹ when deciding whether a utility company owed a duty to the motoring public in cases where a vehicle leaves a traveled portion of the roadway and strikes a pole owned by a utility company.²⁹² The court identified several cases in which this issue was addressed to illustrate how the court had rendered different opinions after applying the *Webb* formula.

In *Northern Indiana Public Service Co. v. Sell*,²⁹³ the court of appeals concluded that the utility company was entitled to summary judgment because the balancing factors regarding the imposition of a duty all weighed against

284. *Id.* at 837.

285. *Id.*

286. *Id.*

287. *Id.* at 838.

288. 672 N.E.2d 475 (Ind. Ct. App. 1996).

289. *Id.* at 477.

290. *Id.*

291. 575 N.E.2d 992 (Ind. 1991).

292. *Goldsberry*, 672 N.E.2d at 478.

293. 597 N.E.2d 329 (Ind. Ct. App. 1992).

imposing such a duty.²⁹⁴ In *Sell*, a passenger in a car struck a utility pole after the driver fell asleep at the wheel, crossed the center line, and went down an embankment.²⁹⁵ However, in *State v. Cornelius*²⁹⁶ the court found that summary judgment was inappropriate because the relationship and public policy components weighed in favor of imposing a duty and questions of fact existed as to the foreseeability factor.²⁹⁷ In *Cornelius*, the plaintiff, a motorcyclist, was injured when his motorcycle was struck by a motorist which caused it to slide across the roadway and collide with a utility pole.

In *Goldsberry*, the court of appeals held that GTE had a duty to the motoring public to exercise reasonable care when placing telephone poles along highways.²⁹⁸ In reaching its decision, the court noted that *Sell* failed to distinguish between the foreseeability component of the duty analysis and the foreseeability component of proximate cause.²⁹⁹ The court reasoned that foreseeability in the context of proximate cause is based on hindsight evaluating the facts of the actual occurrence.³⁰⁰ On the other hand, the foreseeability component of duty requires a more central analysis of the broad type of plaintiff and harm involved without regard to the facts of the actual occurrence.³⁰¹ The court of appeals specifically disagreed with the analysis in *Sell* (which examined the facts of that case in detail and concluded that the foreseeability component of duty was not met) and concluded that under a general analysis appropriate to determine duty, it is foreseeable that a motorist will leave the roadway and strike a utility pole.³⁰² Thus, the foreseeability factor weighs in favor of imposing a duty.³⁰³

The court next addressed the “relationship” factor in imposing a common law duty. Once again, the court disagreed with the decision in *Sell* in its position that a relationship was “limited” to legitimate users of the highway, which did not include users riding in a car that had crossed the center line and opposing lane of traffic.³⁰⁴ In contrast, the court held that there was a relationship between *Goldsberry* and GTE sufficient to impose a duty and that the issue of whether or not the highway was being used as it was intended to be used is a more appropriate consideration under the foreseeability factor of the duty analysis.³⁰⁵

294. *Id.* at 334.

295. *Goldsberry*, 672 N.E.2d at 478 (citing *Sell*, 597 N.E.2d at 329).

296. 637 N.E.2d 195 (Ind. Ct. App. 1994).

297. *Goldsberry*, 672 N.E.2d at 478 (citing *Cornelius*, 637 N.E.2d at 201).

298. *Id.* at 481.

299. *Id.* at 479. This author agrees with Judge Friedlander’s dissent which implies that the majority’s analysis in applying two different standards when analyzing the foreseeability components of duty and proximate cause is misplaced. *Id.* at 481-82.

300. *Id.*

301. *Id.*

302. *Id.* at 480.

303. *Id.*

304. *Id.* (citing *Sell*, 597 N.E.2d at 332).

305. *Id.*

Finally, the court held that public policy would not be offended by requiring a telephone company to act reasonably and prudently when placing their poles.³⁰⁶ The court once again disagreed with *Sell* and reasoned that imposing a duty upon the utility company, under these circumstances, would not be tantamount to imposing absolute liability in all utilities and car/utility pole accidents in that the duty question was one of but three elements that needed to be proved before liability would be imposed under a negligence claim.³⁰⁷

Almost one year later, the court of appeals revisited this issue in *Bush v. Northern Indiana Public Serv. Co.* (NIPSCO).³⁰⁸ In *Bush*, the plaintiff, Kelley Bush was injured when a car driven by Nathan Henderson left the road and hit a utility pole located in a grassy area approximately four and one half feet from the road. At the time of the accident, Henderson was driving recklessly, approximately forty-five (45) miles an hour and had just traveled through an S-curve. Bush filed a complaint against NIPSCO, the city of Valparaiso, and Porter County. The defendants filed a motion for summary judgment and the trial court granted summary judgment in favor of the defendants. Bush appealed.

The court of appeals first addressed Bush's argument that summary judgment was inappropriate because NIPSCO owed her a duty. In line with this line of cases, the court applied the three part *Webb* formula in determining whether NIPSCO owed Bush a duty³⁰⁹ and concluded that "no relationship which would give rise to a duty exists."³¹⁰ In reaching this conclusion, the court stated that "a utility company has a relationship only with those persons using the road as it was intended to be used"³¹¹ and Henderson's speeding and driving recklessly was not normal use of the road.³¹²

The court further concluded that no duty existed because the harm suffered by Bush was not foreseeable.³¹³ The court noted that there are some circumstances when it might be reasonably foreseeable that a motorist could leave the road and collide with a utility pole, such as when a utility pole is located on a sharp curve, when several prior accidents involving the same pole have occurred, or when the pole is located on an island in the middle of a dangerous intersection.³¹⁴ The court stated that Bush presented no evidence to

306. *Id.* at 480-81.

307. *Id.* The majority opinion in this case operates so that utility companies will never be able to obtain summary judgment because the court will always impose a duty. Thus, utility companies will be forced to proceed to trial in order to prove their cases. Such a scheme flies in the face of judicial economy.

308. 685 N.E.2d 174 (Ind. Ct. App. 1997).

309. *Id.* at 177. In determining whether a common law duty exists, the court must consider three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; (3) public policy concerns. *Webb*, 575 N.E.2d at 995.

310. *Bush*, 685 N.E.2d at 177.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 177-78 (citing *Cornelius*, 637 N.E.2d at 199).

show that it is foreseeable that a motorist would leave the road and strike a pole. The court took note of the exact location of the pole in reference to the street and considered several other factors before it concluded that there were no facts to indicate that the pole was placed in a dangerous location.³¹⁵

Next, the court addressed Bush's argument that the trial court erred in determining that any negligence committed by Valparaiso or Porter County was not the cause of her injuries. The court concluded that Henderson's intentional act of driving at an excessive speed and reckless was the cause of the accident, thereby superseding any liability of Valparaiso and Porter County. Thus, the trial court was justified in reaching its decision.³¹⁶

315. *Id.* at 178.

316. *Id.*

1997 SURVEY OF THE UNIFORM COMMERCIAL CODE IN INDIANA

HAROLD GREENBERG*

INTRODUCTION

This Survey summarizes and comments upon developments during the survey period that are of special interest and that affect the Uniform Commercial Code (U.C.C.) in Indiana.¹ Decisions of the Seventh Circuit Court of Appeals that deal with U.C.C. issues from other states, but not yet clearly addressed by Indiana courts, have also been included. Until Indiana courts decide the issues in this group of cases, these decisions will be binding on Indiana's federal district courts, which frequently decide U.C.C. cases while sitting in diversity,² and may be persuasive authority in the state courts.

I. STATUTORY CHANGES

A. A New Article 6—Bulk Sales

During its 1997 session, the Indiana Legislature adopted a new Article 6—Bulk Sales to replace original Article 6 which had been adopted as part of the enactment of the Code in 1963.³ This article of the Code relates primarily to protecting the creditors of a business that is selling more than half its inventory out of the ordinary course of business, whether voluntarily by negotiation, by auction, or by a liquidator on the seller's behalf.⁴

The drafting committee, which was chaired by Gerald L. Bepko,⁵ had concluded that compliance with former Article 6 was unnecessarily burdensome, particularly when the seller had numerous creditors or was engaged in business at a number of locations. The statute applied strictly to all bulk transfers, even those clearly not intended to defraud creditors, and in some cases "may have

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1. IND. CODE §§ 26-1-1 to 26-1-9 (1993 & Supp. 1997). Unless the Indiana version of the Code differs from the Official Draft, the citation form used will be generic form of the Official Draft rather than that of the Indiana version of the Code, e.g., U.C.C. § 2-207 rather than section 26-1-2-207 of the Indiana Code. Citation to the Code in other states will also use the generic form.

2. See, e.g., *Community Bank v. Stevens Fin. Corp.*, 966 F. Supp. 775 (N.D. Ind. 1997); *Kittle v. Newell Coach Corp.*, 830 F. Supp. 1209 (S.D. Ind. 1993); *Dale R. Horning Co. v. Falconer Glass Indus., Inc.*, 730 F. Supp. 962 (S.D. Ind. 1990).

3. New Article 6 is designated IND. CODE § 26-1-6.1 (Supp. 1997); former Article 6 is IND. CODE § 26-1-6 (1993). These will be differentiated in text by references to Article 6.1 and Article 6, respectively.

4. See U.C.C. §§ 6-102, 6.1-102.

5. See U.C.C., 2C U.L.A. 5 (1991). Chancellor Bepko, of Indiana University-Purdue University at Indianapolis, is a former Dean of the Indiana University School of Law—Indianapolis.

[had] the unintended effect of injuring, rather than aiding, creditors."⁶ Moreover, many states had enacted nonuniform amendments.⁷ In the drafters' opinion, "[T]here is no evidence that, in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith."⁸ Accordingly, the sponsors of the Code⁹ encouraged all states that had adopted original Article 6 to repeal and not replace it.¹⁰ In the alternative, for those states disinclined to repeal the Article, the sponsors substantially revised it.¹¹ The majority of states that have considered the matter have repealed Article 6.¹² Indiana, however, chose to join the minority and to enact the Revision.

The major changes brought about by Revised Article 6 are described by the drafters as follows: (1) it applies only when the buyer has notice or reason to know that the seller will not continue to remain in business; (2) it does not apply when the value of property sold is less than \$10,000 or more than \$25,000,000; (3) the law of only one state applies; (4) when there are a large number of creditors, the buyer may give notice by filing rather than by sending individual notices; (5) the notice period is increased from ten to forty-five days, and the statute of limitations from six months to one year; (6) the notice must include a "Schedule of Distribution" that describes how the proceeds are to be distributed; (7) a buyer who acts in good faith is not liable for noncompliance; (8) a non-complying buyer is liable only for damages and his title to the goods is not affected.¹³ In particular, the Revision contains samples of the Notice of Sale Form for use in an ordinary bulk sale¹⁴ and of the form for use in a bulk sale by auction or by a liquidator.¹⁵ Needless to say, these forms should be followed scrupulously in order to avoid problems.

Although one might hope that the legislature would have joined the majority in repealing Article 6 entirely, the Revision at least, in the words of the drafters, "resolves the ambiguities that three decades of law practice, judicial construction, and scholarly inquiry has disclosed."¹⁶

6. See IND. CODE ANN. § 26-1-6.1-101, U.C.C. Cmt. (West Supp. 1997).

7. *Id.*

8. U.C.C., 2C U.L.A. 7 (1991).

9. The Conference of Commissioners on Uniform State Laws and the American Law Institute.

10. U.C.C., 2C U.L.A. 7 (1991).

11. *Id.*

12. As of September 11, 1997, 35 states had repealed former Article 6, six states (including Indiana) and the District of Columbia had enacted the Revision, legislation had been introduced in two states, and no action had been taken in the remainder. *UCC Scorecard*, COM. L. NEWSL. (A.B.A. Sec. of Bus. L.), Nov. 1997, at 22-23.

13. See IND. CODE ANN., § 26-1-6.1-101, U.C.C. Cmt. (West Supp. 1997).

14. U.C.C. § 6.1-105.

15. *Id.* § 6.1-108.

16. See IND. CODE ANN., § 26-1-6.1-101, U.C.C. Cmt. (West Supp. 1997).

II. NOTEWORTHY CASES

A. Article 2—Sales

1. *A Signed Writing under the Statute of Frauds: § 2-201.*—In *Owen v. Kroger Co.*,¹⁷ the narrow issue was whether notes written on memopads satisfied the requirement of section 2-201 that for the contract between the parties “to be enforceable, (1) there must be a writing sufficient to indicate the existence of a contract; and (2) that writing must be signed by an authorized agent or broker . . .”¹⁸ Plaintiff, a commercial flower grower and seller, sued defendant, a supermarket chain, for allegedly breaching contracts for 1992 and 1993 purchases of large quantities of flowers.¹⁹ During meetings to discuss the buyer’s needs for each coming season, in response to requests from the seller, representatives of the buyer wrote numbers on memopads that indicated quantities of flowers needed during specific weekly periods. The pre-printed memopads each contained the logo of the buyer’s floral division and words “from the desk of” followed by the name of the person who wrote the numbers. In each of the years involved, the buyer purchased fewer flowers than indicated in the memos, thereby, according to the seller, breaching the contract between them. Both parties moved for summary judgment: buyer on the ground that even if there were contracts, they were unenforceable under section 2-201, and seller on the ground that the memos were evidence of the contracts which the buyer breached and which satisfied section 2-201.

Since the memos did not bear a traditional signature, the issue was whether the presence of the logo constituted a “symbol executed or adopted by a party [the buyer] with present intention to authenticate a writing.”²⁰ After examining many cases on the issue, the court correctly concluded that the pre-printed wording on the memos could satisfy the statute, but there remained the question whether they did, i.e., whether the buyer’s representatives “intended to authenticate the memos by using the pre-printed memopad sheets.”²¹ The buyer

17. 936 F. Supp. 579 (S.D. Ind. 1996).

18. *Id.* at 583. Section 2-201(1) states:

Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

U.C.C. § 2-201(1) (1995). The court noted that none of the statutory exceptions found in sections 2-201(2) or (3) applied. *Owen*, 936 F. Supp. at n.10.

19. *Owen*, 936 F. Supp. at 582. There was also a claim for breach of a 1994 contract, but it presented issues different from those disposed of in this opinion.

20. *Id.* at 584; *see also* U.C.C. § 1-201(39) (1995).

21. *Owen*, 936 F. Supp. at 585.

claimed that the figures were “‘guesstimates’” and not written with the intention to authenticate anything.²² The court ruled that since the intention to authenticate is a question of fact which is appropriately left to the jury, the motions of both parties for summary judgment should be denied.²³

On a matter not specifically raised by the parties in the pending motions, the court observed that even if the authentication is established, there remained the issue whether the memos also satisfied the requirement of a writing sufficient to indicate the existence of a contract, an issue on which the court expressed doubt.²⁴

2. *A Party's Right to Inspection of the Goods*: § 2-515.—In *J.R. Cousin Industries v. Menard, Inc.*,²⁵ a case dealing with section 2-515(a) of the Code,²⁶ the court was, in its words, writing “largely on a clean slate”²⁷ because there are few reported cases involving the section, and none dealing with the issues presented in *Cousin*.²⁸

Cousin Industries, an importer of hardware, agreed to sell to Menard, a home-improvement product retailer, 20,000 sinks and toilets manufactured in Mexico, to be delivered by the manufacturer directly to Menard. A term of the agreement provided that Cousin would credit Menard for the price of any of the goods that were defective or that were returned by buyers to Menard. The agreement further provided that with respect to any such goods, Cousin could either have Menard ship the goods back to Cousin at Cousin's expense or have Menard destroy them. Cousin opted to have Menard destroy the goods because it would have been uneconomical to have them shipped back.²⁹ After shipments began and Menard subtracted what Cousin thought was an overly high amount for returns, Menard stated that many of the items were defective. Cousin requested that Menard allow it to inspect the defective goods at Menard's premises. Having already destroyed \$15,000 worth of goods, Menard allowed

22. *Id.*

23. *Id.*

24. *Id.* at 585-86.

25. 127 F.3d 580 (7th Cir. 1997) (construing Wisconsin's Code).

26. Section 2-515(a) states:

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other;

U.C.C. § 2-515(a) (1995).

27. *J.R. Cousin Indus.*, 127 F.3d at 580.

28. *Id.* The U.C.C. Case Digest lists a total of six cases as involving section 2-515 since the adoption of the Code in the mid 1950s. U.C.C. CASE DIG. ¶ 2515 (1994 & Supp. 1997). The leading writers on the Code, White & Summers, do not even discuss the section in their treatise. See 4 JAMES J. WHITE & ROBERT R. SUMMERS, UNIFORM COMMERCIAL CODE, TABLE OF STATUTES 645 (4th ed. 1995 & Supp. 1997).

29. *J.R. Cousin Indus.*, 127 F.3d at 581.

the inspection of a small quantity of undestroyed goods, refused to allow further inspections, destroyed the rest, and subtracted \$72,000 from Cousin's invoices. Cousin sued, and the jury awarded Cousin \$70,000.³⁰

At the outset, the court noted that Menard's destruction of the goods after Cousin's section 2-515 request to hold them for inspection had prevented Cousin from accurately estimating its damages and deprived Cousin of evidence it could have used in an action against its Mexican supplier.³¹

Menard argued that section 2-515 applied only in cases of rejection or revocation of acceptance of goods and that Cousin, in the contract, had waived its right to inspect. Referring to principal drafter Karl Llewellyn's unpublished notes and to the Official Comment, the court rejected Menard's argument.³² Otherwise, the court noted, a buyer could avoid the requirements of section 2-515 by accepting the goods and complaining of their nonconformity in an action for breach of warranty.³³ The purpose of the section was to preserve evidence, to avoid gamesmanship, and to promote the possibilities of an agreement to resolve any dispute, a purpose that could be frustrated by Menard's restrictive interpretation.³⁴ The court concluded "that Cousin had a right of inspection under section 2-515 even though Menard was not attempting to reject the goods in dispute or to revoke its acceptance after acceptance of them . . . [and] that the jury was entitled to reject the argument that Cousin waived its right of inspection."³⁵

The court's interpretation of section 2-515 and the result in the case are sound. According to Professor Hawkland, the section was intended to preserve the rights of both the buyer and the seller. Before the Code became effective, a rejecting buyer would be unable to preserve evidence of non-conformity by retaining a sample of the goods. His retention could well be construed as an acceptance that nullified rejection. Similarly, after a buyer accepted and gained control of the goods, the seller was deprived of a way to prove that the goods conformed to the contract.³⁶ Thus, it is reasonable to construe the statute as the court did: to permit inspection and preservation of evidence at any stage before suit is filed, after which the rules of discovery take over.

The court's (and Menard's) characterization of Menard's conduct as not constituting a rejection or revocation of acceptance, however, is questionable. The court could have characterized Menard's conduct as rejection or revocation with little difficulty. Neither term is defined in the Code,³⁷ although the duties of the revoking buyer with respect to the goods are the same as if he were

30. *Id.*

31. *Id.*

32. *Id.* at 582.

33. *Id.*

34. *Id.*

35. *Id.*

36. 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-515:01 (1982).

37. See U.C.C. §§ 2-601, 2-608 (1995).

rejecting.³⁸ When rejecting or revoking acceptance, the buyer must make clear that he wants nothing further to do with the goods and that he is throwing all responsibility for them back on the seller.³⁹ Thereafter, "when the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty . . . to follow any reasonable instructions received from the seller with respect to the goods"⁴⁰ The rejecting or revoking buyer may also recover "so much of the price as has been paid."⁴¹ In other words, the buyer either gets his money back or does not have to pay for the subject goods.

In *Cousin*, the buyer, Menard, by demanding a full credit for the price of defective goods against the amounts due, was indicating that it did not intend to keep those goods, a rejection. With respect to goods returned to it by its customers, Menard was revoking its acceptance in the same manner. By contract, the parties had agreed on how rejection or revocation was to be manifested: by deducting the price of the defective or returned goods. The contract also contained instructions to Menard as to what to do with the goods after rejection or revocation: either ship them back or destroy them, as instructed by Cousin. Cousin chose destruction. Thus, even if Menard were correct in its contention that section 2-515 applies only in cases of rejection or revocation, it still would have lost. Notwithstanding the court's hesitation at calling Menard's conduct rejection or revocation of acceptance, the interpretation of the section and the result in the case are correct.

3. *Limitation of Liability Under Section 2-719 and Strict Products Liability.*—The Indiana Supreme Court, voting 3-2 in *McGraw-Edison Co. v. Northeastern Rural Electric Membership Corp.*,⁴² ruled that a limitation of liability provision in a contract for the sale of electrical power equipment was unenforceable as a defense in the buyer's action brought under Indiana's Product Liability Act.⁴³ McGraw-Edison sold electrical power station equipment to Northeastern pursuant to a contract that included a limitation of liability provision, as permitted under section 2-719.⁴⁴ The provision specifically limited

38. *Id.* § 2-608(3).

39. See HAROLD GREENBERG, RIGHTS AND REMEDIES UNDER U.C.C. ARTICLE 2 § 21.5 (1987); I WHITE & SUMMERS, *supra* note 28, § 8-1.

40. U.C.C. § 2-603(1) (1995).

41. *Id.* § 2-711(1).

42. 678 N.E.2d 1120 (Ind. 1997).

43. IND. CODE § 33-1-1.5-1 to -10 (1993 & Supp. 1997).

44. Section 2-719 provides, in pertinent part:

(1) Subject to the provisions of subsection (2) and (3) of this section and of IC 26-1-2-718 on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly

the seller's liability to the purchase price, whether the claim was for "breach of contract, breach of warranty or negligence."⁴⁵ Some years later, a fire, allegedly caused by a defect in the equipment, caused property damage in excess of ten times the purchase price. The buyer sued for damages pursuant to the Product Liability Act,⁴⁶ following which the seller moved for partial summary judgment in its favor based on the contractual limitation of liability. The trial court denied the motion, and the court of appeals affirmed and held that the limitation of liability provision was unenforceable. The Indiana Supreme Court affirmed.⁴⁷

After discussing both the Code and the Product Liability Act, which post-dated the Code, a majority of the court concluded the intention of the legislature to be that the Product Liability Act negates the ability of a seller to limit liability for defective goods except where the total circumstances demonstrate the agreement of the parties to the limitation.⁴⁸ The circumstances in this case did not support enforcement of the limitation.⁴⁹

One of the dissenting opinions agreed with the majority that, notwithstanding the Products Liability Act, private agreements that allocate risks between sophisticated parties will be enforceable, but it disagreed with what appears to be the majority's test for enforceability.⁵⁰ The dissenting opinion distills that test to require the following findings before the limitation of liability will be enforced. The finding needed is that

- (i) the underlying transaction was between "truly large and 'sophisticated' organizations," (ii) "the amount of money involved . . . was very large," and (iii) "the parties did not simply trade printed forms, but rather entered into true negotiations over all the terms and conditions, including the allocation of risks from product defects and the

agreed to be exclusive, in which case it is the sole remedy.

....

- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable, but limitation of damages where the loss is commercial is not.

U.C.C. § 2-719 (1995).

45. *McGraw-Edison*, 678 N.E.2d at 1121.

46. An action solely under the Act might have been seen as a way of avoiding the limitation of liability that apparently satisfied section 2-719. However, there may also have been a problem with the Code's statute of limitations which bars any action brought more than four years after the date of delivery, absent a definite extension of time. *See* U.C.C. § 2-725 (1995). The equipment had been purchased in 1978, the fire occurred in 1982, and suit was filed in 1984. *McGraw-Edison*, 678 N.E.2d at 1124-25. The limitation under the Product Liability Act is two years from the date of the injury. IND. CODE § 33-1-1.5-5 (1993).

47. *McGraw-Edison*, 678 N.E.2d at 1125.

48. *Id.* at 1124-25.

49. *Id.* at 1125.

50. *Id.*

contract explicitly waives strict liability claims.⁵¹

This, in the dissenters' opinion, "sets the bar for enforceability too high" and changes the "'total circumstances' test into a 'knowing waiver' test."⁵² This author disagrees. On the evidence before the court, as described in the majority opinion, "there is nothing in the record to support the sophistication of Northeastern,"⁵³ and the provision was "a boilerplate limitation of liability in the invoice."⁵⁴ Furthermore, there was no evidence of "a true negotiation over risk allocation," "a knowing assumption of the risk," or "even a conspicuous and explicit provision barring strict liability claims."⁵⁵ These facts support the conclusions of the three courts involved that the totality of circumstances in this case did not demonstrate an allocation of risk to the buyer. Perhaps in some future case, the dissenters may prove to be correct that the test as stated by the majority requires too much, but not in this case on these facts.

B. Article 4A—Fund Transfers

In 1991, the legislature added new Article 4A—Fund Transfers to Indiana's U.C.C. as section 26-1-4.1 of the Indiana Code.⁵⁶ *Community Bank v. Stevens Financial Corp.*⁵⁷ is the first case to arise in Indiana under this Article and, in the words of the court, presents circumstances "unlike any case that has been reported under Article 4A of the U.C.C."⁵⁸ The ultimate issue in the case was whether a bank that had wired a payment order by mistake to the wrong receiving bank could recover the entire amount from the receiving bank, notwithstanding the receiving bank's credit of the amount to the beneficiary's account and subsequent set-off of a debt owed by the beneficiary to the receiving bank.⁵⁹

Pursuant to an ongoing agreement between them, HomeSide Lending Company agreed to purchase a mortgage from Stevens Financial Corporation for \$500,000.⁶⁰ Under the terms of the ongoing agreement and in payment for mortgages it purchased, HomeSide was to transfer funds to Stevens' designated lender, Community Bank. Some time thereafter, Stevens gave HomeSide amended instructions to wire the purchase money to Chase Manhattan Bank. Eight days later, in order to finalize the purchase, HomeSide wired \$500,000, by

51. *Id.* (Sullivan, J., dissenting).

52. *Id.*

53. *Id.* at 1122.

54. *Id.* at 1123.

55. *Id.* at 1124.

56. See 1991 Ind. Acts 2800-88. The enactment was part of a "2A-4A" package and was virtually identical to the 1989 Official Draft of Article 4A. See Harold Greenberg, *Indiana Adds Articles 2A and 4A of Uniform Commercial Code*, 25 IND. L. REV. 1029, 1030 (1992).

57. 966 F. Supp. 775 (N.D. Ind. 1997). The action was originally filed in the Circuit Court of LaPorte County but was removed to the federal district court. *Id.* at 778.

58. *Id.*

59. *Id.* at 780.

60. All sums have been rounded off. The actual purchase price was \$489,466.84. *Id.* at 777.

mistake, to Community and directed Community to credit Stevens' account. On the following day, Community accepted the payment order and credited the funds to Stevens. As of that date, Stevens was in default on a prior obligation it owed to Community. Accordingly, Community exercised its right of set-off and deducted \$125,000 from the transferred amount to satisfy Stevens' debt. Two days after the set-off by Community, HomeSide notified Stevens that it had mistakenly transferred the \$500,000 to Community. At the same time, HomeSide also sent \$500,000 to Chase on Stevens' account in accord with the amended instructions. The next day, HomeSide informed Community that the earlier wire transfer was sent in error and requested Community to cancel the transfer and to wire the amount of the transfer to HomeSide's own bank in New York. Community wired \$375,000 to HomeSide's bank but refused to return the \$125,000 it had set-off earlier.⁶¹

The case was originally filed as an action by Community against Stevens Financial. HomeSide intervened and sought to recover from Community and Stevens Financial on a theory of unjust enrichment. Stevens Financial failed to answer, and a default judgment was entered against it in HomeSide's favor. This opinion dealt with Community's motion for summary judgment that its set-off was proper and that it need not return the \$125,000 to HomeSide.⁶²

The court first noted that the wire transfer was sent via Fedwire, the transfer network of the Federal Reserve Bank, and that, pursuant to Federal Reserve regulations, Article 4A applied to the transaction.⁶³ Moreover, although the court could resort to principles of law or equity outside Article 4A, it could do so only if those principles were not inconsistent with Article 4A.⁶⁴ The court divided the matter into four distinct questions, each of which will be discussed in order.

First, was the wire transfer by HomeSide a payment order?⁶⁵ The court correctly answered in the affirmative.⁶⁶ "Payment order" means an instruction of a sender to a receiving bank . . . to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if: " the instruction is unconditional, the receiving bank is to be reimbursed by the sender, and the instruction is transmitted directly or indirectly to the receiving bank.⁶⁷ In a wire transfer transaction, the party who owes the money (the "originator") instructs its bank (the "originating bank") to pay its creditor (the "beneficiary") by giving the bank a payment order instructing it to pay the appropriate amount into the account of the beneficiary at his designated bank (the "beneficiary's bank").⁶⁸ In this case, HomeSide was both the originator, because it owed the money to

61. *Id.* at 778.

62. *Id.*

63. *Id.* at 780.

64. *Id.* (quoting U.C.C. § 4A-102, Official Cmt. (incorrectly cited as § 4A-101 in the opinion)).

65. *Id.* at 781.

66. *Id.* at 782.

67. U.C.C. § 4A-103 (1995).

68. *Community Bank*, 966 F. Supp. at 782; *see also* U.C.C. § 4A-104, Official Cmt (1995).

Stevens as payment for the mortgage it was purchasing from Stevens, and the originating bank. It sent the payment order to Community, which was both a receiving bank and the beneficiary's bank.⁶⁹ Clearly, the transaction was a payment order, and the court so found.⁷⁰

Second, was HomeSide's payment order authorized?⁷¹ HomeSide contended that the payment order was unauthorized because Stevens had changed its instructions and had designated a different bank to which HomeSide was to wire the funds. Section 4A-202(a) states that "a payment order received by the receiving bank [Community] is the authorized order of the person identified as the sender if that person authorized the order or is otherwise bound by it under the law of agency."⁷² The premise of HomeSide's position was that Stevens, not HomeSide, was the originator or sender of the payment order, a premise with which the court disagreed. The court was correct in concluding that the sender or originator of the payment order was HomeSide itself, acting as both originator and originator's bank in order to pay Stevens for the mortgage.⁷³ The money being sent was HomeSide's money and did not belong to Stevens until payment for the mortgage was complete. If Stevens were the originator with power to authorize the payment order, it would have simply been transferring funds it already owned from one of its accounts to another, a situation totally different from the facts of this case.⁷⁴ In simple terms, the transaction was a purchase by buyer HomeSide from seller Stevens. HomeSide could have paid either by "pulling" the payment from its own account in the form of a check drawn on itself as drawee bank and given to Stevens or by "pushing" the payment from its own account in the form of a payment order to Stevens' bank for credit to Stevens' account. HomeSide did the latter procedure.

Third, notwithstanding Community's acceptance of the payment order, did HomeSide effectively cancel the order an erroneous payment order, thereby continuing HomeSide's ownership of the funds?⁷⁵ A beneficiary's bank accepts a payment order, *inter alia*, when that bank notifies the beneficiary that the beneficiary's account has been credited with the amount of the transfer or when the bank receives payment.⁷⁶ Community received the entire amount and credited Stevens' account five days before HomeSide informed Community and Stevens of its mistake.⁷⁷ The issue reduced itself to: under what circumstances may an accepted payment order be canceled, a matter dealt with expressly in

69. In actual fact, HomeSide sent the payment order to Priority Bank, an intermediary receiving bank, which, in turn, sent the payment order to Community. *Community Bank*, 966 F. Supp. at 782.

70. *Id.*

71. *Id.*

72. U.C.C. § 4A-202(a) (1995).

73. *Community Bank*, 966 F. Supp. at 782.

74. *See id.* at 782-83.

75. *Id.* at 783.

76. U.C.C. § 4A-209(b)(1)(ii) (1995).

77. *Community Bank*, 966 F. Supp. at 784.

section 4A-211(c)(2).⁷⁸ Unless HomeSide could satisfy the specific requirements of this section, HomeSide could not cancel the payment order and reverse the transfer.⁷⁹ The court correctly found that HomeSide failed to demonstrate that it was entitled to cancel the payment order.⁸⁰ However, the court's application of the section appears to be somewhat flawed.

Section 4A-211(c) opens by stating that after acceptance, cancellation of the payment order "is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation."⁸¹ Even if the payment order were unauthorized, as argued by HomeSide but rejected by the court, the payment order, once accepted, could be canceled only if Community agreed to the cancellation.⁸² Community agreed to the cancellation only as to \$375,000 but not to the balance, and there is nothing in the opinion that refers to any applicable

78. Section 4A-211(c)(2) provides:

(c) After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a fund-transfer system rule allows cancellation or amendment without agreement of the bank.

(2) With respect to a payment order accepted by the beneficiary's bank, cancellation or amendment is not effective unless the order was issued in execution of an unauthorized payment order, or because of a mistake by the sender in the funds transfer which resulted in the issuance of a payment order (i) that is a duplicate of a payment order previously issued by the sender, (ii) that orders payment to a beneficiary not entitled to receive payment from the originator, or (iii) that orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator. If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution.

U.C.C. § 4A-211(c)(2) (1995).

79. See *id.* § 4A-211, Official Cmt. 4 ("Under subsection (c)(2), cancellation or amendment is possible only in the four cases stated.").

80. *Community Bank*, 966 F. Supp. at 785-86.

81. U.C.C. § 4A-211(c) (1995). The Official Comment states: "Since acceptance affects the rights of the originator and the beneficiary it is not appropriate to allow the beneficiary's bank to agree to cancellation or amendment except in unusual cases. Except as provided in subsection (c)(2), cancellation or amendment after acceptance by the beneficiary's bank is not possible unless all parties affected by the order agree." *Id.* § 4A-211(c), Official Cmt.

82. See *id.* (Case #1, in which the payment order was unauthorized). "Under subsection (c)(2) Originator's bank can cancel the order if Beneficiary's bank consents." *Id.* (emphasis added). In *Cumis Insurance Society, Inc. v. Citibank, N.A.*, the court stated that the beneficiary's bank is "under no obligation to agree to return the funds once accepted pursuant to [§ 4A-211]." 921 F. Supp. 1100, 1110 (S.D.N.Y. 1996). The transfers in *Cumis* were sent to the beneficiary's bank by mistake, and, after acceptance and credit, that bank permitted the beneficiary to withdraw the funds. The beneficiary's bank was willing to agree to return the funds if certain conditions were met. Those conditions were not met and the bank withdrew its offer to agree to return the funds. *Id.* at 1103.

system rule. The Code says nothing about whether a beneficiary's bank can agree to a partial cancellation, but there seems to be nothing to prevent such a cancellation. By analogy, a party that takes a negotiable instrument in good faith, for value, and without notice of any problems becomes a holder in due course only to the extent that value, represented by a promise to perform, has actually been performed.⁸³ If this were a negotiable instruments transaction, Community would have been a holder in due course to the extent of \$125,000.

An additional issue, apparently not raised and therefore not discussed, is whether Community had a right to cancel the order and return any of the funds. A proper reading of section 4-211(c) limits the beneficiary's bank ability to agree to cancellation to the four circumstances set forth in (c)(2) only; it cannot simply agree to cancel if none of the four exists.⁸⁴ As discussed below, none of the four circumstances existed, and it is questionable whether Community could even agree to the return of \$375,000.

Assuming that Community could and did agree to cancellation of the full payment order, the court misconstrued the application of the remainder of section 4A-211(c) with respect to the four circumstances under which the payment order may be canceled after the beneficiary's bank agrees. The court said that if the payment order was unauthorized, one of the other three circumstances had to exist.⁸⁵ The court misread the statute. The circumstances for cancellation after the beneficiary's bank agrees are stated in the alternative: accepting an unauthorized payment order *or*, because of mistake, sending a duplicate order *or* payment to someone not entitled *or* payment of too great an amount.⁸⁶ If the payment order were unauthorized and Community had agreed to the cancellation, there would have been no necessity to demonstrate more, and HomeSide would have been entitled to the full amount. But the court had already found that the payment order was not unauthorized, so that basis for cancellation was not available to HomeSide. Nevertheless, the court continued that, assuming the order was unauthorized, HomeSide also had to demonstrate that one of the three other circumstances existed. The court was correct in concluding that none of those circumstances existed. Stevens was entitled to receive payment, and the amount transferred did not exceed the amount to which Stevens was entitled. More importantly, the payment order was not a duplicate order, as HomeSide contended. In permitting cancellation where there is a duplicate order, the drafters appear to have contemplated a proper order followed by a duplicate of the very same order sent in error.⁸⁷ As the court noted, the payment order to Community was the first order, not a duplicate, and the order to Chase was not

83. See U.C.C. § 3-302(d) & Official Cmt. 6 (1995); *see also id.* § 3-303. With reference to Community's set-off as constituting value, see the discussion *infra* notes 89-90 and the accompanying text.

84. *See id.* § 4A-211, Official Cmt. 4; 3 WHITE & SUMMERS, *supra* note 28, § 23-7d.

85. *Community Bank*, 966 F. Supp. at 785-86.

86. *See supra* note 77 (quoting U.C.C. § 4A-211(c)(2)).

87. *See id.* at Official Cmt. 4 (Case #2).

sent by HomeSide until days later and therefore was not a duplicate, either.⁸⁸ Thus, none of the requirements of section 4A-211 were met by HomeSide.

Fourth, was Community's set-off proper?⁸⁹ Section 4A-502(c) expressly permits a beneficiary's bank that has received a payment order to credit the beneficiary's account and then set off against the credit an obligation owed to the bank.⁹⁰ HomeSide argued that principles of law and equity outside the U.C.C. supported its claim to the \$125,000, since the payment had been made by mistake and Community had not relied on the payment to its detriment.⁹¹ The court correctly concluded that principles of law and equity outside the Code apply only where not displaced by Code provisions.⁹² In this instance, the facts of the case fell squarely within the provisions of Article 4A, which controlled the entire scenario.⁹³ As described by the drafters:

In the drafting of Article 4A, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment. A deliberate decision was also made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. . . .

[C]ompeting interests were represented in the drafting process and they were thoughtfully considered. The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in this Article.⁹⁴

Accordingly, summary judgment in Community's favor was appropriate.

Although not reflected in the opinion, it is quite likely that Stevens changed its instructions to HomeSide because Stevens knew that its debt to Community

88. *Community Bank*, 966 F. Supp. at 785.

89. *Id.* at 786.

90. Section 4A-502(c)(1) states:

(c) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(1) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

U.C.C. § 4A-502(c)(1) (1995).

91. *Community Bank*, 966 F. Supp. at 786-88.

92. *Id.* at 788.

93. *Id.*

94. U.C.C. § 4A-102, Official Cmt. (1995).

was due and that Community might set-off the debt against the account into which the funds were being transferred. Although different in direction, since a payment order "pushes" the money from the debtor's account into the creditor's account, and a check "pulls" the money from the debtor's account, one might analogize to Articles 3 and 4, which deal with negotiable instruments and bank collections, respectively. If a drawer stops payment on a check and its bank fails to obey the stop payment order, the bank that makes a mistaken payment cannot recover that payment from a holder in due course.⁹⁵ Had HomeSide paid by drawing a check on itself as drawee and sent that check to the wrong bank (Community instead of Chase) for deposit into a Stevens' account, Community's set-off, which it had a right to make,⁹⁶ would have made Community a holder in due course⁹⁷ from whom a mistaken payment could not be recovered.⁹⁸ Either method of payment, pushing the funds or pulling them, yields the same result if the funds reach the equivalent of a holder in due course. That party may retain the funds paid by mistake. The result in *Community Bank* was correct.

C. Article 9—Secured Transactions

A bankruptcy case, *In re A-1 Paving and Contracting, Inc.*,⁹⁹ held that the decision of the Indiana Supreme Court in *Gibson County Farm Bureau Coop. Ass'n. v. Greer*,¹⁰⁰ controlled the outcome of conflicting claims between two secured creditors to the same goods. In *Greer*, the supreme court held that although a standard-form UCC-1 financing statement, standing alone, is not sufficient evidence to create a security interest, "once the Writing Requirement of section 9-203(1) is satisfied, whether the parties intended the writing to create a security interest is a question of fact for the trier of fact to determine."¹⁰¹

The conflict in *A-1 Paving* was between a conditional seller of motor vehicles and equipment and a bank, both of whom claimed a security interest in those vehicles and equipment. The conditional sales contract called for monthly payments and reserved to the seller "all rights and remedies under the Indiana Uniform Commercial Code relating to the foreclosure of mortgages."¹⁰² The seller filed with the appropriate offices a UCC-1 financing statement that listed

95. See *id.* §§ 4-403, 4-407.

96. See *First Bank v. Samocki Bros. Trucking Co.*, 509 N.E.2d 187, 198 (Ind. Ct. App. 1987) ("A bank's right of set-off is also well entrenched in Indiana common law"); DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON PAYMENT LAW 180-82 (4th ed. 1995).

97. A person who takes a negotiable instrument in good faith, for value, and without notice of any problems. U.C.C. § 3-302 (1995). Community acted in good faith and without notice of problems, and the setoff in payment of an antecedent debt constituted value. *Id.* § 3-303(a)(3).

98. See *id.* § 3-318.

99. 116 F.3d 242, 243 (7th Cir. 1997).

100. 643 N.E.2d 313 (Ind. 1994) (discussed in Brad A. Galbraith, 1994 *Developments in Commercial Law and Consumer Protection Law*, 28 IND. L. REV. 879, 880-83 (1995)).

101. *A-1 Paving*, 116 F.3d at 244 (quoting *Greer*, 643 N.E.2d at 320).

102. *Id.* at 243.

A-1 Paving as “debtor” and the seller as “secured party.” After A-1 Paving filed for bankruptcy, the seller sought to recover the goods, to which the bank objected by asserting its own claim. Relying on the UCC-1 form itself and on parol evidence, the trial court found that A-1 and the seller intended the financing statement to create a security interest.¹⁰³ The court of appeals declared that, pursuant to *Greer*, both parol evidence and the UCC-1 form “are permissible sources of evidence to determine that the parties intended to create a security interest” and that the trial court’s findings in favor of the seller were not in error.¹⁰⁴ The creditor may not create a security agreement from parol evidence, but once there is a writing that may serve as the security agreement if it was so intended, parol evidence is a proper source from which the intention of the parties in that regard may be determined.

From a practical viewpoint, the secured party who depends on the UCC-1 financing statement and any supporting parol evidence to create an enforceable security interest is inviting litigation. The better and safer course is to create a separate written agreement that creates the security interest and, when conflict arises, rely on the agreement as creating the enforceable security interest and the filed financing statement as perfecting that security interest and giving notice to all other creditors.

103. *Id.* at 245.

104. *Id.*

